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THE
AMERICAN
AND
ENGLISH
RAILROAD CASES

A COLLECTION OF ALL THE
RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA
AND ENGLAND.

EDITED BY JOHN HOUSTON MERRILL,

VOL. XXX.

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HAMILTON

v.

WESTERN NORTH CAROLINA R. Co.

(*Advance Case, North Carolina. June 8, 1887.*)

The plaintiff made an oral agreement with the defendant railroad company, by which it was to provide on a certain day a certain number of cars for the transportation of plaintiff's cattle to Richmond, Virginia. The agent of the company had knowledge of the shippers' intention to have the cattle arrive at that place in time for the market of a particular day. The cars were not provided as agreed, and the shipment was delayed. When the shipment was made, two days later, a bill of lading limiting the company's liability as to detention, measure of damages, etc., in consideration of a reduced rate, was given. The shipper brought suit to recover damages for the loss occasioned by the delay. On the trial the court instructed the jury that if a certain day in question was a sale day, and the best sale day, and the shipper wished his cattle to be at their destination on that day, and this was known to the railroad company, and was in view of both parties when the contract was made, the shipper would be entitled to such special damage as actually resulted from the circumstances. *Held—*

1. That the parol undertaking was not merged in the contract arising out of the bill of lading, and that the shipper was therefore entitled to damages consequent upon the detention.

2. That the instruction in regard to special damages was not erroneous.

E. C. Smith and T. F. Davidson for plaintiff.

D. Schenck and C. M. Busbee for defendant.

SMITH, C. J.—The present action is prosecuted to obtain redress from the defendant company for an alleged breach of contract on its part, in refusing to receive at its station in Statesville, on Saturday, the 6th day of December, 1884, the day agreed FACTS. on for the purpose, and thence transport two carloads of cattle to Richmond, in Virginia, intended to be sold for beef in that market on the Monday following. The cattle were put in cars on the defendant's road on Monday, two days later, and conveyed and delivered in Richmond early on the morning of the next day. Compensation is demanded to cover the loss from diminished weight and impaired quality of the beef, by the needless pulling the cattle in and taking them out of the cars on the day of the de-

2 HAMILTON v. WESTERN NORTH CAROLINA R. CO.

defendant's failure, for the loss of the best market day in selling, and for the expenses incurred in keeping the cattle at both places. The defendant denies that any contract was made other than that set out in the bill of lading annexed to the answer, which has been strictly performed, and that the attempt to have the cars loaded with the cattle, and attached to the train on Saturday as it passed eastward, failed by reason of the plaintiff's own negligence and delay in loading and having them in readiness for the train of that day, which could not wait for this to be done without hazarding the connection with the through train at Salisbury. The bill of lading is in the following form :

" WESTERN NORTH CAROLINA RAILROAD.
" NOTICE.

" Live-stock will not be taken at reduced rates given, but will be charged full rates, unless the shipper and agent execute the following contract for the shipment of live-stock :

" STATESVILLE STATION, December 8, 1884.

" Received by the Western North Carolina R. Co., of Hamilton & Hardin, the following described stock :

CONSIGNEE AND DESTINATION.	DESCRIPTION.	STOCK.	WEIGHT.
A. G. Robison, Richmond, Va.	1 carload O. K. load and cont. east car	cattle	East 20,000 7,102

—Consigned as per margin, to be transported by Western N. C. R. Co. to freight station, Richmond, Va., ready to be delivered to the consignee or his order, to such company or carrier. If the same is to be forwarded beyond said station, whose line may be considered as part of the route to the destination of said stock, it is directly agreed that the responsibility of the Western N. C. R. as carrier shall cease at the aforesaid freight station, when delivered, or ready to be delivered, to such owner, consignee, or carrier, upon the following conditions, viz.:

" That whereas the Western N. C. R. Co., and connecting lines, transfer live-stock only at certain tariff rates, except when, in consideration of a reduced rate, the owner or shipper assumes certain risks specified below: Now, in consideration of said railroad's agreeing to ship the above-described live-stock at the usual reduced rate of \$45 per carload, to Richmond, Va., and a free passage to the owner or his agent on the train with this stock (if shipped in carload quantities), the said owner and shipper does hereby assume and release the said railroad from all injury, loss, or damage, or

depreciation which the animal or animals, or either of them, may suffer in consequence of either of them being weak, or escaping, or injuring itself, or themselves, or each other, or in consequence of overloading, heat, suffocation, fright, violence, and from all other damages incidental to railroad transportation, which shall have not been caused by fraud or gross negligence of said railroad companies. And it is further agreed that the said owner and shipper is to load, transfer, and unload said stock with the assistance of the company's agents or agent at his own risk; and it is further agreed that while the company's employees shall provide the owner or person in charge of the stock all proper facilities, on train and at stations, for taking care of the same, the business of the company shall not be delayed by the detention of trains to unload and reload stock for any cause whatever, but cars may be left at a station upon request of the person in charge of the same, to be forwarded by next freight train, if he so directs; and the said owner and shipper hereby agrees that said railroad company shall not be held liable for any damage or injury that may occur to said stock during the time the same may remain unloaded, and cut off the cars as aforesaid, and in case said stock is kept over at any given point by the said owner or shipper, or his agent, beyond a reasonable length of time, for feeding and watering, subject always to local laws of any State through which it may pass while in transit, then this contract shall be held to be voidable at the option of these railroad companies, or either of them, in which case such rates of freight may be imposed and collected by said companies as they, or either of them, may deem proper, not to exceed local rates to such points of detention.

"It is further agreed and understood that the presentation of this bill of lading shall be sufficient evidence of ownership to relieve and release these companies from all liability on account of every delivery, but shall not be held to operate against the rights of these companies to demand, if they elect, the identification of the party presenting the bill of lading, before delivery of the said stock to him. And it is further agreed that, in case of accident to or delay of train from any cause whatsoever, the owner and shipper is to feed, water, and to take proper care of stock at his own expense, or the company may do so at the expense of the owner. And it is further agreed that the owner and shipper, or his agent or agents in charge of stock, shall ride upon the freight train on which the stock is transported, and that he does assume and release said railroad companies from all risks of personal injury while about or upon the trains of the companies. And it is further agreed that, should damage occur for which the company may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed for a stallion or jack \$200; for a horse or mule \$100; cattle \$20; other

animals \$15 each. And it is further agreed that, when stock is shipped in less quantities than a carload, the company's agent shall assess freight on the animal or animals at the following tariffs, and collect freight accordingly, regardless of what the actual freight may be, viz.: Horses, mules, and horned animals estimated at 1000 pounds each, and value limited at \$100 each; jacks, stallions, and bulls estimated at 2000 pounds each; hogs and calves may be estimated at 230 pounds each; hogs and calves in lots of five or more estimated at 200 pounds each; sheep and lambs may be estimated at 115 pounds; sheep and lambs in lots of five or more estimated at 100 pounds each.

"And this agreement further witnesseth that said owner and shipper has this day delivered to said company the live-stock described above, to be transported on the conditions, stipulations, and understandings above expressed, which have been explained to, and are fully understood by, the owner and shipper.

[Signed]

"J. S. SCALES.

"Name of person in charge:

HAMILTON & HARDIN,

"J. C. HARDIN.

Owners and Shippers.

"*Instructions to Agents and Conductors*: Agents will indorse on this contract and copy name of person or persons in charge of stock. When so entered, conductors of train carrying the stock will recognize and pass the parties, but they will not be recognized on any other train. The original contract, duly signed by shipper, must be given to the shipper of the stock, and a duplicate signed and marked 'duplicate' sent to the general claim agent."

ISSUES.

(1) Did the defendant contract with the plaintiffs as alleged in the complaint? *Answer*. Yes. (2) Did the defendant have knowledge of the object of the plaintiffs to have the cattle in Richmond, Va., on a particular day, as set out in the complaint? *A*. Yes. (3) Did defendant fail to comply with the contract as alleged? *A*. Yes. (4) What damage, if any, have the plaintiffs sustained by reason of the failure of their agents to comply with the contracts? *A*. Two hundred and fifty dollars (\$250). (5) After the contract made between the parties as alleged in the complaint, could the defendant have shipped the cattle beyond the North Carolina line before Monday morning? *A*. Yes.

Judgment accordingly. Rule for new trial. Rule discharged. Judgment for the plaintiffs. Appeal prayed and granted. Notice of appeal waived. Appeal-bond fixed at fifty dollars (\$50). Bond given in open court.

At the trial before the jury the plaintiffs proposed, and, after objection made and overruled, were allowed to prove, by the witness Hardin, that at the plaintiffs' instance he saw and applied to

one Scales, an agent of the defendant at Statesville, for two cars to carry cattle to Richmond, as he wished to be present at the sales there on Monday, and was answered: "You know the rules of loading, and must be on time." That by daylight on Saturday morning, the next day after the interview, the cattle were at the chute or place of loading, none of the company's servants were at the depot, except the night-watchman; that, with such assistance as he could get, the cars were pushed up, one car filled and the other nearly loaded, when the train came; that the work of loading was hurried up, and the cattle all put in, when the train moved and, without any attempt to attach the two cars, proceeded on its way and left them; that the cattle were then taken from the cars and kept over till Monday, when they were again put on the cars and carried to Richmond, reaching their destination early the next day. The plaintiff, Hardin, testified to the same effect, as to getting the cattle on the cars, moving them to the chute for that purpose, and, just as the loading was finished and the cars ready, the starting of the train without them. Both witnesses testified to the damages from needlessly putting the stock in and taking them out of the cars, estimating the damage at from 50 cents to one dollar to each of the forty-nine animals sent. The other damages claimed were for expenses incurred by the delays at Statesville and Richmond before the next sales day, Friday, after their arrival. The testimony of the agent Scales, a witness for his principal, is that he made no contract for the transportation of the cattle, except that contained in the bill of lading, and this was with the plaintiff Hardin; that the witness Bledsoe came to his office on Friday, and asked for two stock cars, and witness said he had them; that Bledsoe remarked, "I will have two carloads of stock to arrive that evening," not saying when or where he wanted them sent; that on the same day one car was pushed up to the chute, and another near to it; that on Saturday morning plaintiff Hardin came to witness and asked why his cattle were not sent; witness inquired if his stock were loaded, and the reply was, "Not quite," and witness then said, "We never hold trains;" that this was between 7 and 8 o'clock; that the train from the west is due at 7 A.M., and usually waits three minutes, but this morning was delayed ten minutes. The engineer in charge of the train stated that when he started there were a dozen cattle still to put in the car at the chute, one hundred yards off over the track; but if loaded he could have attached the cars to the train in 15 or 20 minutes; and, if detained 20 minutes, would have missed connection with the Richmond & Danville train at Salisbury. The conductor testified that the last of the cattle were being put on the car "when we pulled out," and that the latest moment the train could wait, and not lose connection, would be 7:30. This is the substance of the evidence bearing upon the material matters in controversy, which

are whether any contract was entered into before Monday ; and, if so, upon whom rests the blame for the omission to convey the stock on the train of Saturday.

1. The facts in proof are, in our opinion, sufficient to warrant the finding that the defendant company did undertake to furnish the cars and transport the cattle on the Saturday following, which, if carried out in detail, would have been at the usual charge ; or, if the reduced rate was accepted, put in the form of the bill of lading afterwards issued. But it was not less an agreement, though arrested in its incipency by the defendant's failure, if it can be properly attributed to it, to carry it out at the time fixed upon. The undertaking to have the cars in readiness for the stock imposed an obligation to take the initiatory steps towards transportation, which was broken by its omission or neglect. The duty of putting the cattle on the cars devolved upon the plaintiffs ; that of preparing and having them ready, on the company. If this were not so, no contract whatever would ever be formed until the issue of the bill of lading, while this only determines the conditions of the transportation after the cars pass under control of the company or its agents. This instrument regulates the time of the second or executed contract, of which no complaint is made ; but that antecedent, broken by the neglect to forward on the Saturday before, is not merged in the latter, and its consequences averted. Indeed, the written instrument is but in execution of a preliminary agreement resting in parol and its consummation.

2. Was there such default on the defendant's part as to expose it to a claim for damages? From the defendant's own agent it appears that he was expecting the stock to arrive on Friday evening, and the cattle were there early the next morning, and no preparation seems to have been made by the company's agent to have the cars in readiness to receive them in time for the early train. They were, however, about loaded (some testimony affirming both cars loaded), when the train moved off. There were 20 minutes' time then to spare before it was necessary to leave, to insure connection at Salisbury. How long it would be necessary to wait to connect the cars with the train and prepare the necessary papers, does not appear, and, at least during this interval, no effort was made to accomplish the result. It was early in the morning, but the train was due early in the morning, and the plaintiffs were early at their work. They appear to have been in no default, and it would seem that equal promptness on the part of the company's employees would have insured the transportation. At least the jury might so reasonably infer from the facts detailed, and thus place the blame of miscarriage of the arrangement upon the defendant and its servants.

This disposes of the alleged error in regard to the refusal of in-

NEGLECT OF
COMPANY TO
PROVIDE CARS.
ITS LIABILITY.
THE BILL OF
LADING.

THE QUESTION
OF DAMAGES
CONSIDERED.

structions requested upon the question of the existence and validity of the contract, and those only remain to be considered which relate to the measure of damages. The controversy upon this inquiry is confined to such as are claimed to result from the defendant's failure to have the cattle in Richmond on Monday, in time for the sales of that day, and the consequent loss of a favorable market. The extent of the loss is not shown in the evidence, and we must assume, if any damages were added on this account, they were in accordance with the proofs; and thus is drawn in question the charge of the court as to the consideration and allowance of the claim for any. Upon this point the instruction given is in these words: "If you find that Monday was a sale day, and the best sale day, when plaintiffs' beef cattle could have been sold to the best advantage, and the plaintiffs wished their cattle to be in Richmond on that day, and this was known to defendant, and was in view of both parties when the contract was made, the plaintiffs would be entitled to have such special damages as actually result to the plaintiffs from these special circumstances." This is in response to the defendant's prayer for an instruction which proposed to limit the recovery to the difference in value of the cattle (that is, in deterioration and change in the market, as we understand) when they ought to have arrived, according to the contract, and did arrive, whereof no proof had been given; and, secondly, that special damages for loss of a bargain are not recoverable, unless the carrier knew all the circumstances, and agreed to deliver them at a day certain, and knew that Monday was sale day for cattle in Richmond. The finding on the second issue seems to cover the point, and brings home to the defendant's agent a knowledge of the fact; and while the issue is in terms very general, no objection to its form was made, as not presenting it to the jury.

The manner in which the jury were charged, in regard to such additional damage, is in accord with the ruling in *Lindley v. Railroad Co.*, 88 N. C. 547; s. c., 9 Am. & Eng. R. R. Cas. 31, and furnished no cause of complaint to the appellant. No error.

Failure of Carrier to Furnish Cars—Liability.—See *Baker v. Kansas City, etc., R. Co.*, 28 Am. & Eng. R. R. Cas. 61; *Richardson v. Chicago, etc., R. Co.*, 18 Ib. 580.

Merger of Previous Parol Agreement in Subsequent Bill of Lading.—In *Bostwick v. Baltimore, etc., R. Co.*, 45 N. Y. 712, it was decided that the mere delivery by a carrier and receipt by a shipper, without examination, of a bill of lading limiting the carrier's liability, and expressing on its face that, by accepting it, the shipper agrees to its provisions, after the goods have been actually shipped, under a verbal agreement, does not conclude the plaintiff from showing the actual agreement. The rule that prior negotiations are merged in a subsequent written contract does not apply. *Rapallo, J.*, said: "If the plaintiff had expressly assented to the terms of the bill of lading subsequently delivered to him, such assent would operate as a change of the terms of the contract originally made and under which he had parted with his property. But after the verbal agreement had been con-

summated and rights had accrued under it, the mere receipt of the bill of lading, inadvertently omitting to examine the printed conditions, was not sufficient to conclude the plaintiff from showing what the actual agreement was under which the goods had been shipped." This case reversed *Bostwick v. Baltimore, etc., R. Co.*, 55 Barb. 137; where it was held that where a bill of lading is made out by the carrier and accepted by the shipper, all previous parol agreements are merged in it.

Carrier's Liability for Loss of Market.—In *Toledo, etc., R. v. Lockhart*, 71 Ill. 627, delay occurred in carrying live-stock to market, while the carrier had contracted to deliver them on a certain day which was a market day, and it was held that he was liable for the expense of keeping the cattle till the next market day. See also *King v. Woodbridge*, 31 Vt. 565.

In *Simpson v. London, etc., R.*, 45 L. J. Q. B. 182; L. R. 1 Q. B. D. 274, the plaintiff was a dealer in cattle spice, and was in the habit of going about to agricultural shows, exhibiting samples, and having exhibited them at a show at B., was desirous of exhibiting them at another show at N. The defendant railway company had a special office in the show-ground at B. for the purpose of receiving and forwarding exhibited goods, and the plaintiff's agent delivered his wares to the defendant's clerk, who supplied a blank consignment note which was filled up by the plaintiff's agent, describing the goods as sundries, addressed to the N. show-ground and indorsed "Must be delivered on Monday certain." The goods not having been delivered on Monday, nor in time for the show, it was *held* that the plaintiff was entitled to recover the damages resulting from the defendant's failure to deliver in time—that is, his expenses and loss of profits. It is a general rule, that where a carrier is notified, either expressly by the nature of the articles, or by custom of any special circumstances which make delay or loss of unusual consequence to the consignee, he is liable to respond in damages for all injury or loss which he might reasonably have foreseen would occur; unless such notice is given or can be reasonably inferred, he is not liable further than is indicated above. *Illinois Central R. v. Cobb*, 64 Ill. 128; *Toledo, etc., R. v. Lockhart*, 71 Ill. 627; *Chicago, etc., R. v. Hale*, 83 Ill. 360; *King v. Woodbridge*, 34 Vt. 565; *Vicksburg, etc., R. v. Ragsdale*, 46 Miss. 458; *Great Western R. v. Redmayne*, L. R. 1 C. P. 329; *Gee v. Lancashire, etc., R.*, 6 H. & N. 211; *Pickford v. Grand Junction R.*, 12 M. & W. 766; *Horn v. Midland, etc., R.*, L. R. 8 C. P. 131, 42 L. J. C. P. 59.

In *Philadelphia, etc., R. v. Lehman*, 56 Md. 209; s.c., 6 Am. & Eng. R. R. Cas. 194, the question was not upon the express contract to deliver within a specified time, but upon the implied contract to deliver within a reasonable time. Upon the point involved the court observes: "As it is sought to charge the defendant with the consequences of the delay, and the failure to use such a degree of diligence in forwarding the cattle as would have secured their arrival at Jersey City in time for the cattle market on Monday, the 29th of July, it is material and necessary that it should be shown that the defendant had knowledge, or from the circumstances of the case, and the course of the trade, he might have reasonably inferred, that the cattle were intended for the market on that day. The defendant, at least, should have had an opportunity of contemplating the special circumstances of a breach of duty, or to make some special provision against incurring the liability therefor, and without notice this could not well have been done. *Hadley v. Baxendale*, 9 Exch. 341; *Great Western R. v. Redmayne*, L. R. 1 C. P. 329; *Horn v. Midland R.*, L. R. H. C. P. 131; *Grindle v. Eastern Exp. Co.*, 67 Me. 317."

In *Horn v. Midland R.*, 42 L. J. C. P. 59, L. R. 8 C. P. 131, the plaintiff had contracted to deliver at a given date, at an exceptionally high price. Notice was given to the station-master that they must be delivered at the given date, and if not so delivered, they would be thrown on the plaintiff's

hands; but nothing was said about the exceptional character of the contract, or the unusually high price of the goods. The company failing to deliver within the time, it was *held* that they were not liable for the profit lost by the plaintiff in his contract by the exceptional price of the goods.

In England under the Railway & Canal Traffic Act (17 & 18 Vict. c. 31), which requires that contracts of carriers shall be just and reasonable, a condition in the following form has been held to be reasonable: "That the company will not, under any circumstances, be liable for loss of market, or other claim arising from delay or detention of any train, whether at starting or at any of the stations, or in the course of the journey," the claim being for loss of market. *White v. Great Western R.*, 26 L. J. C. P. 158; 2 C. B. N. S. 7. See also, *Lord v. Midland R.*, L. R. 2 C. P. 339; 36 L. J. C. P. 170; *Redman's Law of Railway Carriers*, 67. See also, on this general subject, *Langdon v. Robertson*, and note, *infra*.

GROGAN & MERZ

v.

ADAMS EXPRESS CO.

(*Pennsylvania. November 17, 1886.*)

In Pennsylvania a common carrier may by a special contract limit his liability for loss or injury to goods carried by him as to every cause of injury except that arising from negligence.

ERROR to the court of common pleas, No. 2, of Allegheny county.

This was an action in case against an express company for \$198, the value of a package shipped by it, which did not reach its destination. The company, when it received the package, gave to the shipper a receipt containing the following: "It is part of the consideration of this contract, and it is agreed that the said express company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by said express company intrusted, or arising from the danger of railroads, ocean or river navigation, steam, fire in stores, depots, or in transit, leakage, breakage, or from any cause whatsoever, unless, in every case, the same be proved to have occurred from the fraud or gross negligence of said express company or their servants; nor in any event, shall the holder hereof, demand beyond the sum of fifty dollars, at which the article is hereby valued, unless otherwise herein expressed, or unless specially insured by them and so specified in this receipt, which insurance shall constitute the limit of the liability of the Adams Express Co. . . . In no event shall the Adams Express Co. be liable for any loss or damage unless the claim therefor shall be presented to them in writing at this office,

within thirty days after this date, in a statement to which this receipt shall be annexed." The verdict was for the plaintiff for \$56.18.

William R. Blair for plaintiffs in error.

T. S. Parker for defendant in error.

GREEN, J.—In the case of *Farnham v. Camden & Amboy R. Co.*, 55 Pa. St. 85, this court decided that a common carrier might by a special contract, and perhaps by notice, limit his liability for loss or injury to goods carried by him as to every cause of injury except that arising from negligence. In that case there was a special contract, signed by the receiving clerk of the carrier company, expressed in the receipt given to the shipper, limiting the responsibility of the carrier to \$100 for every one hundred pounds of freight, the shipper declining to pay for any higher risk. The goods were carried to their destination, unloaded upon the carrier's wharf and there destroyed by fire. Although the goods were still in the carrier's custody at the time of the loss, it was held that unless it was proved that the fire was the result of the carrier's negligence, there was no liability beyond the amount limited in the receipt given by the carrier. But it was also held that if there had been proof of such negligence the limitation would not have restricted the carrier's liability. Under the particular facts of the case the common carrier, by force of the special contract, became a private carrier, or bailee, whose liability was to be judged by the terms of the contract. Not being an insurer therefor, as a common carrier, it was held that there was no liability beyond the amount stipulated in the bill of lading, except for negligence, and that the burden of proving the negligence rested upon the shipper. In determining that it was a case of special contract much stress was laid upon the fact that the bills of lading duly executed and signed by the agents of the defendant containing the limitation were delivered to the plaintiffs, accepted by them and remitted to their agent in New York, as his authority to receive the goods, and that "these, therefore, were the terms on which the transporters shipped their goods and on which they were received to be transported." In determining the question of negligence, it was held that the proof of loss by an accidental fire was a sufficient accounting for the non-delivery of the goods, and that, unless the shipper could prove that the fire was the result of negligence, there was no liability beyond the limited amount fixed by the contract.

In the case of *American Express Co. v. Sands*, reported also in 55 Penn. St. 140, the doctrine was repeated that common carriers may limit their liability by a special contract, or special acceptance of the goods, and thus become subject to the laws of bailment only, but that there could be no limitation of liability where the loss or

injury resulted from the negligence of the company or its servants. The article carried was a saw, and on its arrival at its destination it was cracked eight to ten inches. There was no evidence to show how this injury was sustained, and hence it was held there arose a presumption of negligence, which it was the duty of the carrier to rebut or to be held liable for the full value of the saw, notwithstanding the limitation of \$50 liability expressed in the freight receipt given to the shipper. Thompson, J., said: "Had they been able to have shown a *prima facie* case of injury without fault on their part they would not have been liable beyond the limit fixed unless the plaintiff could have established negligence against the company as to the manner of the injury; but their silence was reconcilable with nothing but negligence or wilfulness, either of which would be followed by liability to the full extent of the loss." The doctrine of these two cases is precisely alike on the fundamental proposition that liability could be limited by special contract, but not for negligence.

In the one case the carrier escaped liability because he accounted for the destruction of the goods in a manner which did not impose liability without express proof of negligence. In the other case the carrier was held liable because he did not account for the injury, and a presumption of negligence arose which he did not rebut.

How is it in the case at bar? We think it must be conceded that by the terms of the express receipt signed by the company's agent, and delivered to and accepted by the plaintiff, the article shipped was valued at \$50, and the company limited its liability to that sum, and this limitation would be a protection against liability beyond that amount, except for negligence. It is a contract almost precisely similar to the one upon which we passed in the case of the American Express Co. v. Sands, *supra*, but it is stronger than that in favor of the carrier, because it contains an express agreement that the article forwarded was valued at \$50, which the receipt in the Sands case did not. But the express company in the present case failed to account for the non-delivery of the article, and hence a presumption of negligence arose which they should have rebutted in order to escape liability, but they did not do so. It was error, therefore, in the learned court below to refuse an affirmance of the plaintiff's first point, which is a mere declaration of the ruling of this court in the Sands case.

In addition, however, to this, the learned court further charged the jury that the defendant could limit its liability even as against its own negligence, and had done so by the receipt given to the plaintiffs when the goods were shipped. This was done in obedience to a decision of the snpreme court of the United States in the case of Hart v. Penn. R. Co., 112 U. S. 331; s. c., 18 Am. & Eng. R. R. Cas. 604. An examination of that case shows that such is the law as declared by that court, and if the declaration

were of binding authority upon us, we would be obliged to follow it. But our own decisions for a long time have established the opposite doctrine, until it has become firmly fixed in our system of jurisprudence. We could not depart from it now without overruling them all, and we are not willing to do so. The authorities upon the general subject are very numerous and conflicting. But with us the rule has been uniform, and we prefer to adhere to it. Entertaining these views, we reverse the case upon the first, fourth and sixth assignments of error. The fifth is not sustained, because as a proposition the defendant's third point is undoubtedly true. We say nothing as to the second and third assignments, because, as there must be another trial, the questions arising under them may come up before us under a different aspect.

Judgment reversed, and *venire de novo* awarded.

Power of Common Carrier to Limit Liability.—See, generally, *Louisville & N. R. Co. v. Meyer*, 27 Am. & Eng. R. R. Cas. 44; *Hart v. Chicago, etc., R. Co.*, 27 Ib. 59; *Moulton v. St. Paul, etc., R. Co.*, 12 Ib. 13; *Galveston, etc., R. Co. v. Allison*, 12 Ib. 28; *Alabama, etc., R. Co. v. Little*, 12 Ib. 37; *Graves v. Lake Shore, etc., R. Co.*, 16 Ib. 105; *St. Louis, etc., R. Co. v. Cleary*, 16 Ib. 122; *Rintoul v. New York, etc., R. Co.*, and note, 16 Ib. 144; *Canfield v. Baltimore, etc., R. Co.*, and note, 16 Ib. 152-157; *Kansas City, etc., R. Co. v. Simpson*, and note, 16 Ib. 158-164; *Manchester, etc., R. Co. v. Brown*, 16 Ib. 174; *Piedmont, etc., R. Co. v. Columbia, etc., R. Co.*, 16 Ib. 194; *Wabash, etc., R. Co. v. Peyton*, 18 Ib. 1; *Camp v. Wabash, etc., R. Co.*, 18 Ib. 542; *Bartlett v. Pittsburgh, etc., R. Co.*, 18 Ib. 549; *Taylor v. Little Rock, etc., R. Co.*, 18 Ib. 590; *Weinburg v. Railroad Co.*, 18 Ib. 597; *Little Rock, etc., R. Co. v. Talbot*, and note, 18 Ib. 598-603; *Kiff v. Atchison, etc., R. Co.* 18 Ib. 618; *Little Rock, etc., R. Co. v. Harper and Wilson*, 21 Ib. 97; *Chicago, etc., R. Co. v. Moss & Co.*, 21 Ib. 98; *Wilson v. New York, etc., R. Co.*, and note, 21 Ib. 148-150; *Rosenfield v. Peoria, etc., R. Co.*, and note, 21 Ib. 89-91; *Hart v. Penna. R. Co.*, 1 Ib. 615; *Pittsburg, etc., R. Co. v. Barrett*, 3 Ib. 256; *Harvey v. Terre Haute, etc., R. Co.*, 7 Ib. 293; *Holsapple v. Rome, etc., R. Co.*, 3 Ib. 487; *Am. Ins. Co. v. St. Louis, etc., R. Co.*, 6 Ib. 589; *Hauston, etc., R. Co. v. Burke*, 9 Ib. 59; *N. O., etc., R. Co. v. Fales*, 9 Ib. 90; *Nicholas v. New York, etc., R. Co.*, 9 Ib. 103; *McKinney v. Jewett*, 9 Ib. 209.

Effect upon Carrier's Liability of Statements in Bill of Lading as to Value of Goods.—The case of *Hart v. Pennsylvania R.*, 112 U. S. 321; s.c., 18 Am. & Eng. R. R. Cas. 604, referred to by the court, is a late and important decision; it is not unlikely to change the current of authority upon this question. The United States Supreme Court there held that where the contract of carriage signed by the shipper is fairly made with the railroad company agreeing on the valuation of the property carried, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible, and the freight he receives, and of protecting himself against extravagant and fanciful valuations. In its opinion, the court concedes the force of the rule now almost universal in the United States, that the carrier cannot, by contract, relieve himself from liability for negligence, but maintains the view that those decisions do not rule the question at issue. The court observes: "There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight,

on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage if there is no loss; and the effect of disregarding the agreement after a loss is to expose the carrier to a greater risk than the parties intend he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses and had been told by the plaintiff the sum inserted in the contract."

The stringent rule which prevents the carrier from contracting against liability for negligence found its origin in such considerations as the inequality in the positions of the parties respectively contracting, the public character of common carriers, and their liability to the control of legislation, requiring that their contracts shall be just and reasonable in the eyes of the law. The court in the above case of *Hart v. Pennsylvania R. Co.* holds in effect that such considerations do not enter into the case where the carrier demands that the consignor shall practically liquidate the damages to be recovered in the event of a loss at the time of shipment. The carrier is, by universal consent, to establish a rate of freight, based upon the value of the goods; and the court maintains that a shipper who fails to declare the real value of his goods and to pay a proportionate charge cannot subsequently demand the full value of the goods, simply for the reason that the carrier has insured them against loss by negligence. In the principal case the court, it will be observed, merely affirms prior decisions in Pennsylvania, upon the general principle stated, but does not enter into the considerations upon which the decision in *Hart v. Pennsylvania R.* is based.

The view of the last-mentioned case is sustained in the following authorities: *Squire v. New York Central, etc., R. Co.*, 98 Mass. 239; *Muser v. Holland*, 17 Blatchf. C. C. 412; *Harvey v. Terre Haute, etc., R.*, 74 Mo. 538; s. c., 6 Am. & Eng. R. R. Cas. 293; *Graves v. Lake Shore, etc., R.*, 137 Mass. 83; s. c., 16 Am. & Eng. R. R. Cas. 108; *Dunlap v. Inter. Steamboat Co.*, 98 Mass. 371; *Judson v. Western, etc., R.*, 6 Allen (Mass.), 486; *Railroad Co. v. Fraloff*, 100 U. S. 26; *Magnin v. Dinsmore*, 56 N. Y. 168, 62 N. Y. 35, 70 N. Y. 410; *Hopkins v. Westcott*, 6 Blatchf. C. C. 64; *Earnest v. Express Co.*, 1 Woods C. C. 573; *South, etc., R. v. Henlein*, 52 Ala. 606; s. c., 56 Ala. 368.

Another line of cases maintains that where a clause in the bill of lading limits the amount of the common carriers' liability it should not be construed to release the carrier from liability for loss or damage occurring through his negligence, but that in such case there may be a recovery for the entire loss. *American Express Co. v. Sands*, 55 Pa. St. 140; *Moulton v. St. Paul, etc., R.*, 31 Minn. 86; *Kansas City, etc., R. v. Simpson*, 30 Kans. 645; s. c., 16 Am. & Eng. R. R. Cas. 188; *Lamb v. Camden, etc., R.*, 46 N. Y. 271; *U. S. Express Co. v. Backman*, 28 Ohio St. 144; *Orndorff v. Adams Exp. Co.*, 3 Bush (Ky.), 194; *Mobile, etc. R. v. Hopkins*, 41 Ala. 486; *Chicago, etc., R. v. Abels*, 60 Miss. 117; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Kirby v. Adams Exp. Co.*, 2 Mo. App. 369; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184; *Judson v. Western R. Co.*, 6 Allen (Mass.), 486; *Steamboat City of Norwich*, 4 Ben. C. C. 271; *Merrison v. Construction Co.*, 44 Wis. 405; *Black v. Goodrich Transp. Co.*, 55 Wis. 319; *Moulton v. St. Paul, etc., R.*, 31 Minn. 85; s. c., 12 Am. & Eng. R. R. Cas. 13; *Kansas City, etc., R. v. Simpson*, 30 Kans. 645; s. c., 16 Am. & Eng. R. R. Cas. 158.

Compare with the decision in the principal case *Elkins v. Empire Transp. Co.*, 81* Pa. St. 315. In that case the agent of the consignees shipped certain wines and signed a bill of lading in the usual form which contained, in writing, the rate of freight specified at "50 cents per 100 pounds," and valuation "\$20 per barrel." The plaintiff claimed the whole value of the loss, notwithstanding the words on the bill of lading; and the defence was, that the

carrier's compensation for the service performed and for the risk run was fixed and regulated by this valuation. The court below charged that if the shippers agreed with the carrier that his responsibility should be limited by the valuation, no more could be recovered; but if they did not, then the whole loss might be recovered. Further, that such an agreement might be deduced from the evidence, although the shipper did not, in express words, tell the carrier he would so limit his responsibility, and that it might be inferred from a course of business and regulations, known to the consignor, taken in connection with his acceptance of a bill of lading, based on such a course of business and regulation known to the consignor. The jury found in favor of the defendant upon these points, and the supreme court affirmed the decision, holding that a carrier by special agreement may limit his responsibility to a sum proportioned to his compensation and risk, irrespective of what might otherwise be a loss. It would be difficult, if not impossible, to distinguish this case from the principal case. The point involved in each one narrows itself down to the question as to whether the valuation given by the consignor in the bill of lading shall, or shall not, govern the amount to be recovered from the carrier. Until the decision in the principal case, it is believed that upon this precise question no different ruling had been made in Pennsylvania. Compare *Beckman v. Shouse*, 5 Rawle, 189; *Bingham v. Rogers*, 6 W. & T. 500; *Laing v. Colder*, 8 Pa. St. 484; *Camden, etc., R. v. Baldolf*, 16 Pa. St. 67; *Goldey v. Pennsylvania R.*, 30 Pa. St. 246; *American Express Co. v. Sands*, 55 Pa. St. 140; *Elkins v. Empire Transp. Co.*, 81* Pa. St. 315. But see *Adams Express Co. v. Holmes*, *infra*.

ADAMS EXPRESS Co.

v.

HOLMES.

(*Advance Case, Pennsylvania. April 18, 1887.*)

Grogan v. Adams Express Co., *ante*, p. 9, followed.

If goods are lost or injured while in the custody of an express company, in the absence of explanation which rebuts the presumption of negligence, it will be presumed that the loss or injury was occasioned by the negligence of the company, and the carrier will be liable for the actual value of the goods.

In an action to recover the value of goods delivered to an express company, where no explanation is given for its failure to deliver the goods, it may be inferred that they are still in the hands of the company, and are withheld from the owner.

JANUARY Term, 1887, No. 261, E. D., before Mercur, Ch.J., Gordon, Trunkey, Sterrett, Green, and Clark, JJ.

Error to the Common Pleas No. 3 of Philadelphia county, to review a judgment on a verdict for plaintiff in an action to recover the value of certain goods delivered to an express company. Affirmed.

At the trial in the court below the following facts appeared :

In December, 1885, the plaintiff, John C. Holmes, purchased of Lyon Bros., wholesale furriers in Philadelphia, a sealskin sacque of the value of \$180. December 11 the same was packed and marked and consigned to Holmes at Cranbury, N. J., and delivered to the agent of the defendant company for transportation. The express man who called for the package signed a receipt contained in a book in the possession of Lyon Bros. The receipt, among other provisions, contained the following :

"It is part of the consideration of this contract, and it is agreed, that the said Express Company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by said Express Company intrusted, or arising from the dangers of railroads, ocean or river navigation, steam, fire in stores, depots, or in transit, leakage, breakage, or from any cause whatever, unless, in every case, the same be proved to have occurred from the fraud or gross negligence of said Express Company, or their servants; nor, in any event, shall the holder hereof demand beyond the sum of \$50, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured by them, and so specified in this receipt, which insurance shall constitute the limit of the liability of the Adams Express Company."

The receipt contained blank spaces for the "date," "No.," "article," "value," "consignee," "destination," "by whom received." No questions were asked and no information was given in regard to the value of the sacque, and the blank space under the word "value" was not filled out. The other blanks were duly filled out.

The sacque was never delivered by the company nor its loss accounted for, and, Holmes having assigned his rights against the express company to Lyon Bros., suit was brought in his name to their use.

At the trial plaintiff proved the receipt of the sacque by the company's agent and its non-delivery by the company, and that its value was \$180.

The evidence in regard to the value of the sacque was objected to by defendant, "because the receipt offered in evidence contains a clause limiting the liability of the company to \$50, where the value of the package is undisclosed by the shipper." Objection overruled. Exception noted. First assignment in error.

The defendant did not offer evidence to account for or in any manner explain the loss or non-delivery, or to disprove negligence on its part; but offered to show "that the defendant company has a different and higher rate and discharge for packages where the value is disclosed, and also that where the value is disclosed, extra

care and precaution is taken by the company against loss or accident, and also the custom of the company in handling packages which have a value exceeding \$50, which are specially insured under the conditions of the receipt." Objected to by plaintiff. Objection sustained. Exception noted. Second assignment of error.

The defendant presented the following points:

1. Under a receipt and contract like the one in evidence, given by the defendant upon the receipt of the goods for shipment, with the value of the package undisclosed and unexpressed, the recovery cannot exceed \$50, with interest from the date of the shipment, notwithstanding the defendant may have been negligent, unless there was a conversion or misfeasance by the defendant, involving not only a wrongful but also a wilful act. A mere non-delivery will not constitute such conversion or misfeasance, nor will a refusal to deliver on demand, if the goods have been lost through negligence or have been stolen.

Ans. Refused.

2. If you find for the plaintiff your verdict can in no event exceed the sum of \$50 and interest thereon from the date of shipment.

Ans. Refused.

The court charged the jury as follows:

It is my duty to charge that you may infer negligence from the mere loss of the goods, and also that the defendant must show by evidence that there was no negligence. I do not recollect any evidence touching the question of negligence.

Verdict and judgment for plaintiff, for \$188.82.

The assignments of error specified the admission and rejection of evidence above noted, the answers to defendant's points, and the charge to the jury.

J. H. Shakespeare and *J. H. Heverin* for plaintiff in error.

Ernest Lowengrund and *Isaac N. Solis* for defendant in error.

PER CURIAM.—The correctness of this judgment could well be sustained under *Grogan v. Adams Exp. Co.*, 18 W. N. C. 478, *ante*, p. 9.

See preceding case and note.

McFADDEN

v.

MISSOURI PACIFIC R. Co.

(Advance Case, Missouri. June 6, 1887.)

In the contract of shipment for a carload of mules, it was stipulated that in consideration of the reduced rate given the carrier was exempted from liability, even in case of his own negligence, beyond a fixed amount. In the course of transportation the car containing the mules, bedded with straw, was placed next to the engine, and caught fire from sparks from the engine and the mules were destroyed. There was evidence to show that the placing the car in that position was unusual, negligent, and dangerous. In an action by the shipper to recover the value of the mules destroyed, *held*—

1. That a petition which not only alleged the delivery and loss of a carload of mules while in defendant's possession as a common carrier, which was sufficient, but charged negligence in managing and operating the train, whereby the car was set on fire and the mules burned, authorized the introduction of evidence to sustain the allegations.

2. That the provision in the contract of shipment whereby the plaintiff assumed "the risk of loss or injury to the mules by fire, or on any account whatever," was inoperative as a defence.

3. That parol evidence was admissible, between the parties, to show that the recital that the rate charged was a reduced one, was false, and therefore the limitation not binding upon the shipper.

ERROR to the Cooper circuit court to review a judgment against the defendant in an action to recover for a carload of mules delivered to a common carrier. Affirmed.

The facts are stated in the opinion.

Thos. J. Portis, with *Thos. G. Portis* and *Wm. S. Shirk*, for appellant.

Cosgrove & Johnston for respondent.

RAY, J.—Plaintiff brought this action in the circuit court of Cooper county, against the defendant, as a common carrier, to recover the value of a carload of mules delivered to defendant at Boonville, to be transported over its railroad to the State line at Kansas City. While in transit, the car containing the mules caught on fire, and thirteen head were burned to death, and the other three so injured as to be a total loss to plaintiff.

An objection was made to the introduction of any evidence, upon the ground that the petition did not state facts sufficient to constitute a cause of action; which said objection was properly overruled. The petition not only alleged the delivery and loss of the mules, while in defendant's possession as a common carrier,—which was sufficient,—but charged negli-

FACTS.
SUFFICIENCY OF
PETITION.

gence in managing and operating the train, whereby the car was set on fire and the mules burned, injured, and destroyed. No other point was made in respect to the pleadings, and we need not set them out.

The evidence of plaintiff shows the delivery of the mules by plaintiff to defendant; that the car in which they were transported was bedded with straw, and placed next to the engine; that this was not customary, but unusual and dangerous, and prudence required that such cars should be placed at a greater distance in the train from the engine; that the rear of the train was the safest place, whilst next to the engine was, for such cars, the most dangerous, on account of the liability of the straw bedding to take fire from the sparks of the engine. It should be also stated that the train in question consisted of fifteen or twenty cars, but two of which, beside the one in question, were loaded with stock, and of these, one was placed next to the car containing the mules injured by the fire, or second from the engine, whilst the other was put near the rear end of the train and next to the caboose. This was the substance of the evidence in chief in behalf of plaintiff.

Defendant offered no oral testimony in the cause, but relied upon the bill of lading or contract of shipment, which it set up in the answer and read in evidence at the trial. The evidence in rebuttal will be considered later in the course of this opinion.

It has been held in this, and in most of the States, that by special or express contract, or special acceptance, fairly and understandingly made, the carrier may limit his common-law liability. The shipper may lawfully, if he sees fit, surrender the obligation of the carrier as an insurer of his property, but the law is firmly settled in this State, that the common carrier cannot, by any sort of stipulation, exempt himself from the consequences of his own negligence. We need not again discuss that question.

If placing the car, bedded with straw, containing the mules, next to the engine was unusual, negligent, and dangerous, and the car was set on fire by the sparks from the engine, and the mules thereby destroyed,—all which the evidence for plaintiff shows, without any attempt at contradiction from defendant,—then, under numerous rulings of this court, the provision in the contract whereby the plaintiff assumed “the risk of loss or injury to the mules by fire or any account whatever,” would be, so far, invalid and no protection to the defendant.

In an analogous case the supreme court of Pennsylvania,—32 Pa. 414,—in considering the liability of common carriers, says: “A defective wheel or axle or framework would confessedly render them liable, even as against the release.” The carrying of a

EVIDENCE AS TO
NEGLIGENCE.

LIMITATION OF
LIABILITY FOR
NEGLIGENCE.

PROVISION EX-
EMPTING DEFEN-
DANT INVALID
UNDER THE
FACTS.

combustible article so near the engine as to be exposed to sparks was even more inexcusable, for this could not escape observation, as defects in the vehicle might. *Powell v. Pennsylvania R.*, 32 Pa. 414. See also *Holsapple v. Rome, W. & O. R. Co.*, 86 N. Y. 275 ; s. c., 3 Am. & Eng. R. R. Cas. 487. At all events, in the absence of all opposing evidence on the part of defendant in that behalf, this court must, after verdict, assume the negligence of defendant, and dispose of the case under that view.

But the stipulation in the contract of shipment most relied on for a reversal of the judgment is the one declaring the company should not be liable for more than \$100 per head for the mules. Such a stipulation, it is claimed, is valid and binding, and does not contravene the rule which forbids the carrier to stipulate against his own negligence. Numerous decisions sustain such stipulations, when fairly made, and where the parties agree on a fixed valuation of the property and a special and reduced rate of freight is given and received, based upon the condition that the carrier assumes liability only to the extent of the agreed value of the property. *Hart v. Pennsylvania R. Co.*, 112 U. S. 331 ; s. c., 18 Am. & Eng. R. R. Cas. 604, and cases cited.

STIPULATION
LIMITING CAR-
RIER'S LIABILITY
BEYOND A CER-
TAIN AMOUNT
CONSIDERED.

Other decisions deny the validity of such provisions, and hold them void, as releasing the carrier from the full and proper liability for the consequences of his negligence. *Black v. Goodrich Transportation Co.*, 55 Wis. 319 ; *Moulton v. St. Paul & M. R.*, 31 Minn. 85 ; *United States Express Co. v. Backman*, 28 Ohio St. 144.

Hutchinson, on Carriers, says, in substance, that the cases cited by him as recognizing the right of the carrier to thus limit the liability as to value occur in States in which the law permits the carrier, by special and express contract, to relieve himself of the consequences of his negligence in the carriage of goods ; and that these cases would not be considered controlling authority in those States in which such claim to exemption is not permitted to be made. Hutch. Car. §§ 250-257. But, even under the rule declared in the former class of decisions, these provisions, thus employed and resorted to by common carriers to restrict their liability, are to be tested by their fairness, justice, and reasonableness.

We will consider the case before us briefly, under this view. The answer charges that defendant agreed to transport the mules for plaintiff, between said points, at the rate of \$31 per car, which was charged to be a special and reduced rate, lower than the regular rate. The written contract, read in evidence, recited that the said rate was a reduced rate, made in consideration of agreement, etc. The execution of the contract was not admitted, but denied, in the reply. The evidence, however, showed that it was in fact signed by the agent of plaintiff after the mules were loaded into

the cars, and just before the train started. This court has heretofore held that all prior verbal negotiations between the parties are merged in the written contract, and that the plaintiff cannot admit the execution of the contract, and avail himself of the fact that he did not read the same or know its contents, where no mistake, fraud, imposition, or deceit is charged to have occurred.

In this case, plaintiff claimed, and was permitted to show by parol evidence, that the said recital in the contract of shipment, that the rate named was a reduced rate, was false; and that the same was the usual and customary rate charged all shippers for similar shipments of such stock by the carload. The oral evidence in that behalf was not objected to by defendant, when offered by plaintiff, and no exceptions saved to its admission in evidence. The following is the substance of this evidence, as given in the abstract for plaintiff, and is, we believe, correct:

ADMISSION OF
EVIDENCE TO
SHOW RECITAL
AS TO REDUCED
RATE FALSE.

R. S. Moore testified that he was the agent of the railway company at Boonville; that the bill of lading in evidence was of the same form in use by the company in April, 1884, and had been for a year before that time; everybody that shipped stock used this form. This is the regular rate of shipment of stock by the carload. The rates on other classes of freight per carload were much higher, considering the value of the mules. These were the usual rates paid by all shippers of stock by the carload.

Mr. Frost, who acted in behalf of plaintiff in making the shipment and signed the contract, testified that nothing was said about the bill of lading being a special contract; that he never asked for reduced rates, but that he shipped the stock and signed the bill of lading in this instance just as he had done in all others when acting for other shippers; and that, so far as he knew, the bill of lading in this case was the ordinary one, and signed by him the same as in all other cases of stock shipment.

The written contract was not, we think, under these circumstances, conclusive evidence, but merely *prima facie* evidence, that the given rate was a special and reduced rate. As between the parties, it was, in this respect, open to explanation, and impeachable for error, mistake, or false statement. The reduced rate, if such it was, was the consideration for the exemption from liability beyond the \$100, even in case of injury and loss from defendant's negligence; and parol evidence in that behalf is, we think, competent and admissible for the purpose indicated.

The consideration clause in bills of lading, contracts, deeds, and other instruments ordinarily has only the force and effect of a receipt, and is open to explanation and contradiction by parol evidence. Hutch. Car. §§ 122, 123; Fontaine v. Boatman's Sav. Inst., 57 Mo. 552; Hollocher v. Hollocher, 62 Mo. 267; Edwards v. Smith, 63 Mo. 119.

But, even if this is not so, it devolved upon the defendant to make the objections to the admissibility, and save the exception, if the objection was overruled; and, having failed to do so, no complaint can now be heard at his instance in that behalf.

This case, then, under this state of facts, does not fall within the rule declared in *Hart v. Pennsylvania R. Co.*, *supra*, and others cited by counsel for plaintiff. In the case of *Hart v. Pennsylvania R. Co.*, especially relied on, the discussion was had upon the terms of the bill of lading alone, and, as the court says, "without any evidence on the subject, and especially in the absence of evidence to the contrary;" and under the qualifications it contains we cannot regard it as controlling authority in a case where the evidence clearly shows absence of reduced or lower rate, or any graduation of compensation to the valuation. On the one hand, it may be, as is there said, unjust, unreasonable, and repugnant to sound principles of fair dealing for the shipper to reap the benefits of a contract by which he secures a lower rate than the carrier might reasonably charge for the service rendered, if there is no loss, and to repudiate it in case of loss. Where the shipper procures the lawful rates of the carrier to be reduced in express consideration of the agreed value upon which the compensation is based, he is, under numerous authorities, some of which are cited, held to be estopped to say the value is greater when the loss occurs. On the other hand, it would, we think, be no less unfair, unreasonable, and unjust that the carrier, without any sacrifice of his interest or lawful demands, or diminution of his lawful charges, should secure, without any consideration therefor, such important advantages and release of liabilities to which he would otherwise be subjected under the law.

Another case especially relied on is the case of *Harvey v. Terre Haute & I. R. Co.*, 74 Mo. 538; s. c., 6 Am. & Eng. R. R. Cas. 293, which we deem distinguishable from this present case, and which we will now examine briefly. In the first place the action was brought upon "a special contract." The horse was alleged to be of the value of \$10,000, and the value was limited by the contract to the sum of \$100. The answer set up the affirmative defence that the defendant had certain regular rates of transportation of horses of ordinary value, and that, for those of greater value, 5 per cent on the owner's valuation was charged in addition; that defendant asked plaintiff or his agent the value of the horse, and that said value was falsely represented to be \$100, and that said valuation given by the plaintiff was then agreed on. Defendant offered evidence tending to establish the matters set up in the affirmative defence; and instructions numbered two and three, submitting this evidence to the jury, were refused by the court. The third was to the effect in substance, that if Dickson intentionally misrepresented the value of the horse, and stated it much

lower than it actually was for the purpose of procuring the lower rate, then plaintiff could only recover the value which he had fixed. This court held it error to have refused the instructions asked, and said: "We do not regard a contract limiting a right of recovery to a sum expressly agreed upon by the parties, as representing the true value of the property shipped, as a contract in any way exempting the carrier from the consequences of its own negligence. Such a contract, fairly entered into, leaves the carrier responsible for its negligence, and simply fixes the rate of freight and liquidates the damages. This, we think, it is competent for the carrier to do. And where the reduced value is voluntarily fixed by the shipper with a view of obtaining a low rate of freight, without any knowledge on the part of the carrier that the property was of greater value, it would be a fraud upon the carrier to permit the shipper to recover a greater sum than fixed by him."

In the case now before us there was no pretence that the plaintiff or his agent fraudulently concealed or falsely represented the real value of the mules. They were delivered without any inquiry or representations as to value. They may have been a somewhat choice lot of mules, but they were not of extraordinary or fanciful value, such as blooded stock, or on account of speed or other qualities, as in the Harvey Case; and there is no pretence that defendant was in any way deceived as to their value, or misled as to the degree of care they would require. On the other hand, the recital that the given rate was a reduced rate was in fact false, as was shown by the evidence of the station agent, who testified it was the usual rate charged all shippers.

If, in the one case, it is competent for the carrier to show that the real value of the property was concealed, and the lower rate thus secured by the fraud or deceit of the shipper, why may not the shipper be permitted to show that the alleged reduced rate, in consideration of which he surrendered the obligation imposed by law upon the carrier as an insurer of the property, was false, and, in fact, no reduced rate at all. It may be that plaintiff was not deceived by it at the time, as he did not ask for, or suppose he was getting, a reduced rate; but if the pretended lower rate was the usual rate, and known to be such to both parties, it would work a fraud upon the rights of plaintiff, under the law, if the defendant were now permitted to treat it as a lower rate, and to thus deprive plaintiff of important rights, and secure release of part of its liability by reason thereof.

Under the circumstances of this case there was, we think, no consideration for the limited valuation placed upon the mules by defendant, and the stipulation in that respect is, we think, void as releasing the carrier from the full and reasonably adequate liability for its negligence.

The instructions given for plaintiff were in harmony with these

views, whilst those refused for defendant were not in accordance therewith.

Finding no error in the record, we affirm the judgment, and it is so ordered.

All concur.

Extent to which Carrier may Limit his Liability.—See next case and note.

Negligence in the Carriage of Live stock—Contracts Limiting Liability.—See *Holsapple v. Rome, Watertown & O. R. Co.*, and note, 3 Am. & Eng. R. R. Cas. 487-489; *Bills v. New York Central R. Co.*, and note, 3 Ib. 318-326; *Harrison v. Missouri Pac. R. Co.*, and note, 7 Ib. 382-389; *Baker v. Louisville, etc., R. Co.*, and note, 16 Ib. 149-152; *Richardson v. Chicago, etc., R. Co.*, and note, 18 Ib. 530-534.

Bedding in Stock-car Catching Fire—Carrier's Liability.—In *Powell v. Pennsylvania R. Co.*, 32 Pa. St. 414, where the company negligently failed to provide suitable appliances to put out a fire which caught in the bedding of some sheep in transit, it was held liable for the damage, notwithstanding a stipulation that it should not be liable for injuries from the burning of straw, hay, or any other material used for feeding the animals or otherwise. See also *Holsapple v. New York Central R. Co.*, 86 N. Y. 275; s. c., 3 Am. & Eng. R. R. Cas. 487.

Effect on Carrier's Liability of Statements in Bill of Lading as to Value of Goods.—See this subject treated at length in note to *Grogan v. Adams Exp. Co.*, *supra*.

LANGDON *et al.*

v.

ROBERTSON.

(13 *Ontario Reports*, 497.)

The plaintiffs ordered goods from K., L. & Co., to be shipped to plaintiffs at Flat Creek, Manitoba, via the C., M., etc., R. Co., by which line plaintiffs had an arrangement for a special rate of freight, of which they informed K., L. & Co., but did not notify them of the terms thereof. K., L. & Co. delivered the goods to C. & M. at Montreal as agents of the defendant's line of boats consigned to the plaintiffs, to be sent by the said line of boats to M., and thence by the C., M., etc., R., and informed C. & M. of the fact of plaintiffs' having a special rate. The bill of lading which C. & M. gave for the goods was prepared by a clerk of K., L. & Co., who stated that he attached thereto a ticket marked "Ship our freight by C., M., etc., R.; great bonded fast line; low rates." The goods were carried by defendant's vessel, not to M., but to D., and thence by railway to their destination, and were accepted by plaintiffs, but plaintiffs had to pay higher freight than if carried as directed. The goods were carried from D. as quickly, or more quickly, than they would have been from M., and the freight would have been less had it not been for plaintiffs' special agreement with the C., M., etc., R. Co. The defendants' conduct in sending the goods by D. was proved to have been wilful.

Held, that there was a valid contract to carry via M., and that plaintiffs

were entitled to recover for the breach thereof in not carrying therefrom; but *held* [reversing the judgment of WILSON, C.J., at the trial], that the plaintiffs could only recover nominal damages.

Held, also, following *Friendly v. Canada Transit Co.*, 11 O. R. 756, that the plaintiffs were the owners of the goods, and entitled to maintain the action.

Held, also, that the contract for the low rate could not be assumed to be illegal, as being contrary to public policy, because lower than the ordinary local rates; for even if it could not be enforced by plaintiffs against the company, this would be no defence to the defendant.

Held, also, that the fact of the bill of lading having been made in the Province of Quebec, did not deprive plaintiffs of the benefit of R. S. O. ch. 116, for not only was this not set up by the pleadings, but also it did not appear that the Quebec law was different from that of Ontario; and in the absence of proof it would be assumed to be the same.

THIS was an action tried by WILSON, C.J., without a jury, at Brampton, at the Spring Assizes of 1885.

The facts were as follows:

In May, 1882, Mr. Shepard, one of the plaintiffs, then being in Winnipeg, gave an order to the firm of Kirk, Lockerby & Co., of Montreal, through Mr. Lockerby then also being in Winnipeg, and subsequently a further order by an agent, for a considerable quantity of goods, directing their shipment to the plaintiffs at Flat Creek, Manitoba, by Milwaukee, in the United States, and thence by the Chicago, Milwaukee & St. Paul R., by which line the plaintiffs had an arrangement for a special rate.

In fulfilment of this order, Messrs. Kirk, Lockerby & Co. delivered to Messrs. Currie & McLean at Montreal, as agents of the Western Express Line of boats, 82,113 pounds weight of goods consigned to the plaintiffs, to be sent by the said Express Line of boats to Milwaukee, and thence by the said Chicago, Milwaukee, & St. Paul R. Co. A clerk of Messrs. Kirk, Lockerby & Co. prepared the bill of lading which Messrs. Currie & McLean gave for the shipment of the goods by the said line. Messrs. Currie & McLean caused the goods to be delivered to the steamer *St. Magnus*, owned by the defendants, and one of the Western Express Line of vessels, to be carried as directed to Milwaukee, at the rate of 16 cents per 100 pounds freight, and there delivered for further carriage to the said railway company; the freight to Milwaukee, amounting to \$131.38, was paid by the shippers in advance. Currie & McLean made out the ship's manifest, and therein showed the goods in question were to be carried to Milwaukee. Messrs. Kirk, Lockerby & Co., informed Messrs. Currie & McLean, that the plaintiffs had a special rate with the Chicago, Milwaukee, & St. Paul R. Co.; and the clerk swore that he got bills of lading from Currie & McLean and attached thereto tickets marked "ship our freight by Chicago, Milwaukee & St. Paul Railway."

On these tickets also appeared the following words printed thereon: "Great bonded fast line, low rates, quick time."

Mr. McLean, of Curry & McLean, said he believed the special rate beyond Milwaukee was only mentioned incidentally, and that he believed he mentioned it to the captain of the boat, but would not swear positively he did; thought he mentioned it on the wharf—was almost positive he did, but would not swear to it.

The captain of the steamer denied positively that it was mentioned to him.

The goods were carried by the defendant's vessel not to Milwaukee, but to Duluth, and were there shipped by railway, not the Chicago, Milwaukee & St. Paul R., and safely reached their destination without delay, and were accepted by the plaintiffs. But they alleged they had to pay freight, amounting to the sum found by the learned chief justice, in excess of what they would have had to pay if the goods had been forwarded by Milwaukee.

It appeared that the distance by Milwaukee was greater than by Duluth to Flat Creek, by several hundred miles, and the ordinary rate of freight by the latter route was less than by the former. The excess in the amount of freight paid by the plaintiffs was only by reason of the alleged special agreement the plaintiffs had with the Chicago, Milwaukee & St. Paul R. Co., that they were injured by the goods having been sent by Duluth instead of Milwaukee.

The learned chief justice, after setting out the facts, found as follows:

WILSON, C. J.—It was said the property in the goods had not passed from Kirk, Lockerby & Co. to the plaintiffs at the time of the shipment of them at Montreal and at the time of their delivery at Duluth; and that Kirk, Lockerby & Co. were the proper persons to sue for the wrong delivery of the goods, if there was a wrong delivery, and not the plaintiffs.

There are three reasons why this objection must fail: Firstly, Mr. Lockerby, one of the firm of Kirk, Lockerby & Co., took the special order from the plaintiffs in Manitoba of the goods to be sent by Kirk, Lockerby & Co. from Montreal to the plaintiffs in Manitoba. That order, no doubt, was in writing, although I am not sure it was said to have been so by any one; but several telegrams were put in from the plaintiffs to the vendors directing the latter how to send the "bill of groceries ordered recently," and signed by the plaintiffs. Secondly, the goods did arrive at their destination and were accepted by the plaintiffs, and they are the persons now entitled to sue in respect of them just as if they had been damaged through the default of the defendant. But, thirdly, the fact that the defendant has not set up the Statute of Frauds as a ground of defence is, besides the other reasons given, a conclusive answer to the defendant's objection.

I must hold that Currie & McLean were the authorized agents of the defendant to receive these goods for carriage, and to give the bills of lading which they subscribed, one of which was given to the master of the boat, one sent to the plaintiffs, and one was retained by Kirk, Lockerby & Co.

Upon each of these bills was the ticket attached to it by Mr. Bertram, the clerk of Kirk, Lockerby & Co., stating "Ship our freight by Chicago, Milwaukee & St. Paul R.," and the further words "low rates, quick time;" and the bills of lading had these tickets or stamps upon them when they were given, as before stated, to the master and to the plaintiffs, and when one of them was retained by the shippers, Kirk, Lockerby & Co.

Mr. McLean, one of the firm of Currie & McLean, said he made the contract, representing his firm; he acted as the agents of the defendant. They were shipped to be delivered at Milwaukee. He was told by Kirk, Lockerby & Co. there was a special rate from Milwaukee to the destination of the goods. He also said he believed he mentioned the fact of the special rate to the captain; was almost positive he did, but will not swear to it.

I must also hold the contract to have been according to the bills of lading, and the manifest, that the goods were to be delivered at Milwaukee for the plaintiffs; and, according to the tickets or stamps attached, that the goods were to be so delivered at Milwaukee, in order that the goods might be shipped by the Chicago, Milwaukee & St. Paul R. for the consignees. All that plainly appeared in and upon the bills of lading, which were specially in the care of the master and purser of the vessel. And I find as a fact that the master, so far as his knowledge is of any consequence, did know the plaintiffs required their goods to be delivered to the particular company, the Chicago, etc., R. Co., whose name was printed upon the ticket.

I hold the defendant to be answerable to the plaintiffs for the non-performance of his contract with them, that is, for any delay, expense, or trouble they were put to by reason of their goods having been delivered at Duluth in place of Milwaukee.

I am not able to discover what loss, trouble, or delay they were put to by reason of such wrong delivery. It was not shown the goods were longer on the road, or that there was any special damage sustained in consequence of that breach of the contract. The distance being about one half that by Duluth which it was by Milwaukee, would lead one to presume that the rate from Duluth would have been lower, at any rate not higher, than by Milwaukee at the ordinary rate of railway charges, and also that the transit would be quicker.

The plaintiff's claim, however, is substantially preferred, for the difference they have been made to day, for full railway rates between Duluth and the destination, and for the special or low rate

their goods were carried at from Milwaukee by an arrangement which they have made with the railway authorities; and to that claim the defendant makes two objections:

Firstly, that a special rate is void as being against public policy; and secondly, if the plaintiffs can get the benefit of it, that they cannot recover it at this time, because the defendant had no notice of the plaintiffs being entitled to such special rate.

The first objection is, that this contract is void, because it shows there were discriminative rates bargained for in a foreign country for the carriage of these goods.

The contract, it appears, was made by Mr. Shepard, one of the plaintiffs in the foreign country, with the officials of the railway companies which were to have carried these goods.

It is not shown to have been an illegal contract where it was made and where it was to be performed. It would be, if it were to be carried out here. There is nothing criminal in such a bargain.

In the *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 226, at p. 237, Blackburn, J., in giving the judgment of the judges, said: "The obligation which the common law imposed upon common carriers, was to accept and carry all goods delivered to him for carriage, . . . unless he had some reasonable excuse for not doing so, on being paid a reasonable compensation for so doing. . . . There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis. All that the law required was, that he should not charge any more than was reasonable."

Then he shows a different provision of law in that respect was made when railways became the mode by which the work of common carriers was to be done.

I do not see any objection to the plaintiff's recovering from the defendant the excessive freight they have been compelled to pay by reason of the goods being landed at Duluth instead of at Milwaukee, against the positive agreement of the parties, if the defendant can be charged with knowledge of that express contract.

It is proved beyond question that the plaintiffs informed the shippers, Kirk, Lockerby & Co., of the special rate the plaintiffs had with the railway companies for the carriage of their goods if landed at Milwaukee, and if carried over the Chicago, Milwaukee, & St. Paul lines, and it is proved that they attached the stamps or tickets to the bills of lading, one of which was upon such bill of lading before and at the time Currie & McLean signed such bills of lading for the carriage of the goods to Milwaukee; and that these tickets stated that the railway company named on the tickets carried these goods by their line at "low rates."

It was also proved that Mr. McLean of the firm of Currie & McLean, the shipping agents of the defendant at Montreal, was

told by Kirk, Lockerby & Co., the plaintiffs had a special rate from Milwaukee.

He also said he believed, and he was almost positive, he told that to the master of the boat, but he would not swear to it.

The master swore positively he was not told of it. If I had to determine between the almost positive belief of Mr. McLean, and the positive denial of the master, I should more safely rely upon the statement of the former than upon the declaration of the latter, whose testimony was not at all satisfactory; and who, with the aid of the purser, altered the ship's manifest by changing the place of delivery from Milwaukee to Duluth; and who upon his return, upon informing Currie & McLean where he had delivered the goods, was told by them that he would get into trouble about it, denied having been so told, although they contradicted him in that respect, leaving the probabilities of that fact strongly against him.

It is sufficient, in my opinion, for this case, to show that Currie & McLean, the defendant's agents, were informed of the fact that there were low railway rates for these goods from Milwaukee, without showing the master also knew it. And these agents did their best to enable the plaintiffs to get the special rates, for they gave the bills of lading and the manifest for the delivery of the goods at Milwaukee; and their acts were and are binding upon the defendant whose agents they were.

I do not believe any of the evidence on the part of the defendant which is opposed to the written terms of the bills of lading or of the manifest.

The term low rates on the tickets could not perhaps have been understood by the master or purser, or by Currie & McLean, the shipping agents of the defendant, and I am rather inclined to think they might not,—and besides their attention cannot be assumed to have been specially called to such words merely by their being on the ticket: *Candy v. Midland R. Co.* 38 L. T. N. S. 226—but when Currie & McLean, whose right to sign the bills of lading the defendant said he did not deny, and who, as he said, had alone the right to sign them, and not the master, knew all about these words and their purpose and effect, it must be held that the defendant by putting the plaintiffs, by the act of his agent the master, to a greater expense than he knew through his agents he should have done in the transit of their goods, is answerable to them for the additional charges they have been obliged to pay by his breach of contract.

I find, therefore, for the plaintiffs; and I assess the damages in their favor to be paid by the defendant at the sum of \$381.68, the additional expense they have been put to by the wrongful delivery at Duluth instead of Milwaukee, and \$82.90 for interest

upon the same from the 26th of July, 1882, when this excessive charge was paid, to this day, making together \$464.58; and I give the plaintiffs the costs of this action.

And I direct that judgment be not entered for one month, nor until the defendant's solicitor has had at least two weeks' notice of this judgment, and of the plaintiffs' intention to enter judgment, in order that he may make any application he may be advised to make.

MacKelcan, Q.C., for the defendant.

Murphy, contra.

CAMERON, C.J.—The learned Chief Justice found as facts that Currie & McLean were agents for the defendant, authorized to make the contract contained in the bills of lading; and the defendant had notice through their agents Currie & McLean, that the plaintiffs had a special rate with the Chicago, Milwaukee, & St. Paul R. Co.; and also, in his opinion, such notice was given to the captain of the defendant's vessel, though positively denied by the captain.

It was not alleged or proved that there was any notice to Currie & McLean more specific than that the plaintiffs had a special rate with the Chicago, Milwaukee, & St. Paul Railway.

As to the first ground of motion, assuming there was a contract between the plaintiffs and defendant to carry the former's goods to Milwaukee, it was clearly broken, and the plaintiffs were entitled to judgment for at least nominal damages, PLAINTIFF ENTITLED TO NOMINAL DAMAGES. as it is beyond dispute that the goods were not so carried: *Sanquer v. London & Southwestern R. Co.*, 16 C. B. 163. There was such a contract if Currie & McLean were agents of the defendant to make the contract; and the finding of the learned Chief Justice that they were the defendant's agents is abundantly supported by the evidence.

Upon the second ground I think the finding is equally free from objection. The plaintiffs were the owners of the goods, whether they ordered them in writing or orally. PLAINTIFFS WERE OWNERS OF GOODS. At least as far as I am concerned, the case of *Friendly v. Canada Transit Co.*, 10 O. R. 756, precludes me from holding otherwise; as in that case I held that by the acceptance of the goods the property became vested in the purchaser from the time of their delivery to the carrier, and whatever right of action the seller had under the bill of lading in respect of the goods up to the time of acceptance, passed upon acceptance by the purchaser to him.

The third and fourth grounds are answered by the answer to the first, that Currie & McLean were in the transaction the agents of the defendant, and were not contracting on their own behalf.

THE CONTRACT
IN REFERENCE
TO RATES—A
BREACH OF CON-
TRACT BY DE-
FENDANTS.

Upon the fifth and sixth grounds, which present the same question in different ways, Mr. Shepard, one of the plaintiffs, swore that he had made an arrangement for a special low rate of freight with the Chicago, Milwaukee, & St. Paul R. Co., to transport sugar in carloads at seventeen and a half cents per hundred pounds, and other goods at thirty cents per hundred pounds; and also with other railways from Milwaukee and Chicago to St. Paul; and with the St. Paul, Minneapolis & Manitoba road to take goods from St. Paul and Minneapolis to St. Vincent.

The statement of the plaintiff Shepard was not contradicted; and uncontradicted it establishes the existence of a contract between the railway company and the plaintiffs to carry at the rates designated; and it cannot be assumed that it was an illegal or invalid contract from the mere fact that ordinary local rates by the same railway were higher, and the contract was executory and not in writing. It was made with the general freight agent of the company.

This is not a contract that the railway company is trying to enforce against the plaintiffs, or the plaintiffs against the railway company; in which case more might be required to be proved. Here a contract existed in fact, whether valid in law or not; and if the defendant had sufficient notice of its existence, and contracted with the plaintiffs in reference thereto, he cannot be permitted to say, to relieve himself from the consequences of his own breach of contract, the plaintiffs were not damnified because they could not have enforced their contract with the company.

The case cited by Mr. MacKelcan of *Hart v. Baxendale*, 16 L. T. N. S. 390, in support of his contention, falls very far short of doing so. The action was against the defendants as carriers for not delivering goods in a reasonable time and safely. The plaintiff in the action received an order for a washstand with marble top from a Mr. May, to be supplied within a week, and on the same day he wrote to a cabinet-maker to supply the same. The latter put the stand and marble top in separate boxes and sent them to the carriers, to be taken by them to a railway station to be forwarded to the plaintiff. On the arrival of the boxes at the station it was found that the box containing the marble top rattled, and the railway officials on this account refused to receive it. The stand was forwarded to the plaintiff, who refused to accept it. The marble top was taken back by the defendants to the cabinet-makers, with instructions to repair it. When repaired it was sent with the stand to the plaintiff, who at first refused to accept them, but afterwards did so under the advice of his solicitor, who advised him to sell them by auction, which he did at the expense of 8s. 6d. The price of the article ordered from the cabinet-maker was £5 10s., and the price expected for it from May, the purchaser,

was £7 10s. The net proceeds of the sale by auction were £2 15s. May had not agreed to pay any fixed price.

Martin, Baron, said to counsel, "What damage has the plaintiff sustained?" To which counsel replied: "Mr. May refused to take the goods which had been ordered." Baron Martin said: "Nothing can be made out of that, because he was under no contract to purchase. You must prove a contract with Mr. May that he should buy at a fixed price."

There was no question here of the validity of the contract. It was not a contract that required to be evidenced by a writing, as the amount was under £10; and the remark of the learned Baron had reference to the necessity of showing an agreement to pay a fixed price to give a measure for the assessment of the damages.

The objection, therefore, presented by this ground is not entitled to prevail.

The greatest difficulty in the way of sustaining the plaintiffs' right to retain their judgment in its entirety, is presented by the ninth ground taken, namely, that the defendant had not sufficient notice of the contract of the plaintiffs with the Chicago, Milwaukee, & St. Paul R. Co. to make him liable for the larger amount of freight paid by the plaintiffs by reason of the defendant's misdelivery of the goods.

WHETHER DEFENDANT HAD SUFFICIENT NOTICE OF CONTRACT WITH CHICAGO & MILWAUKEE ROAD.

Looking at the language of the bill of lading, the undertaking of the defendant through his agents, Currie & McLean, was simply to carry the goods to Milwaukee and there deliver them to the consignees or their agent there to receive them.

It is from matters outside of the bill of lading that the ultimate destination of the goods is ascertained.

The bill of lading itself is as follows, as far as it is important to be considered: "Shipped in good order and condition by Kirk, Lockerby & Co., of Montreal, and consigned to Langdon, Shepard & Co., in and upon the Steamboat Western Express Line, whereof — is master for this present voyage, and now lying in the port of Montreal. Being marked and numbered as per margin, and are to be delivered in like good order and condition at the port of Milwaukee." Then follow the date and description of goods and the mark [L. S. & Co.], Flat Creek, Manitoba, and the signature of the defendant's agents, Currie & McLean.

When Currie & McLean signed the bill of lading, the goods had not been placed on board the defendant's vessel. It is dated 27th June, 1882. But on the 30th June, the goods were put on board, and the ship's manifest of the shipment was as follows: "Western Express Line. Shipped in apparent good order and well conditioned by Currie & McLean, as agents and forwarders for account and risk of consignors or owners of property on board the propeller Saint Magnus, —, master, the following articles, marked as per

margin, and to be delivered in like good order and condition . . . unto the consignees named in the margin or to their assigns."

Then follows, under head of marks, consignees, etc., the names of the plaintiffs thus, "Langdon, Shepard & Co., Flat Creek, Manitoba, care of Chicago, Milwaukee, & St. Paul Railway, Milwaukee."

Under the bill of lading there might be a question whether the defendant assumed any responsibility as to forwarding the goods beyond Milwaukee.

But that consideration is not of importance in this case, as the plaintiffs' claim is based on the non-delivery of the goods at Milwaukee, where, according to the terms of both bill of lading and manifest, they should have been delivered; and the only question really is, what damages are the plaintiffs entitled to? That depends upon the proper solution of the question, had the defendant, as already stated, sufficiently specific or precise notice of the plaintiffs' arrangement with the Chicago, Milwaukee & St. Paul R. Co. to make him liable to the plaintiffs for the extra freight paid by them by reason of the goods not having been carried to Milwaukee, and thence forwarded by that railway to Flat Creek?

If the case of *Horne v. Midland R. W. Co.*, L. R. 8 C. P. 131, is to be treated as not overruled, the notice to Currie & McLean cannot be regarded as sufficient.

In that case the plaintiffs had delivered to the defendants, a railway company, a large quantity of shoes, with notice if not delivered at the time mentioned, they would be thrown back on their hands. The plaintiffs had a contract with the consignees to supply the shoes by the specified time at a price exceeding their market value of one shilling and three pence a pair. The shoes were not delivered by the defendants in time, and the purchasers refused to accept the shoes. It was held in the Exchequer Chamber, confirming the judgment of the court of common pleas, by Kelly, C.B., Justices Blackburn and Mellor, and Barons Martin and Cleasby, that the defendants were not liable; Mr. Justice Lush and Baron Pigott dissenting.

It may be said that notice that the shoes would be thrown back on the plaintiffs' hands was not an intimation that there was any higher price to be paid for the shoes than the ordinary market price; while, in the present case, the notice was of a contract for a special rate, which would be understood by a carrier to mean less than the ordinary rate. But still it was only after all an intimation that the rate was lower than that particular company's ordinary rate, not that it would be less than the rate from a point where the land carriage was much shorter and the ordinary rate considerably less than that by rail from Milwaukee.

In *Die Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473, the defendants contracted with the plaintiffs to furnish 666

SAME—AUTHORITIES EXAMINED.

sets of wheels and axles at stated intervals. The plaintiffs were under contract with a Russian railway company to deliver them 1000 wagons, 500 on the 1st May, 1872, which was after the time at which the last delivery by the defendant Armstrong was to be made, and 500 on the 31st May, 1873, and the plaintiffs were bound to pay the railway company two roubles per wagon for each day's delay. In the course of the negotiation between the plaintiffs and Armstrong, the latter was informed of the contract with the Russian company, but neither the precise day for the delivery, nor the amount of the penalties. Armstrong delayed in delivering a hundred sets of wheels, and the plaintiffs had to pay penalties.

The Russian company, though entitled to 200 roubles, accepted £100. The plaintiffs sued Armstrong to recover that sum. It was held the plaintiffs were not entitled to the amount of the penalties as damages as matter of right; but that the jury might, under the circumstances, reasonably have assessed the damages at that amount. It was so held in consequence of the impossibility of the plaintiffs obtaining wheels to enable them to fulfil their contract; and thus, as I understand the rule in such circumstances, the jury are not confined to nominal damages, but may, without there being any precise measure to guide them, give what in their judgment is reasonable.

The judgment of the court was delivered by Blackburn, J., for Cockburn, C.J., Lush and Quain, JJ.

In his judgment, at p. 447, he said: "At all events the plaintiffs were entitled to recover at a rate per day equal to whatever the jury should find to be reasonable compensation for loss of the use of the wagons: see *Cory v. Thames Ironworks Co.*, L. R. 3 Q. B. 181. We think, therefore, it would have been a misdirection if the jury had been directed to find no more than nominal damages. We have had more difficulty in determining whether the plaintiffs are entitled to keep the verdict for the amount as it stands. If we thought that this amount could only be come at by laying down as a proposition of law that the plaintiffs were entitled to recover the penalties actually paid to the Russian company, we should pause before we allowed the verdict to stand."

Again on page 478, in reference to the case of *Hadley v. Baxendale*, 9 Ex. 341, he said: "And so far as the case decides that the defendant is not liable for any unusual consequences, arising from circumstances of which he has not notice, the case has often been acted upon. But an inference has been drawn from the language of the judgment, that whenever there has been notice at the time of the contract that some unusual consequence is likely to ensue if the contract is broken, the damages must include that consequence; but that is not, as yet at least, established law."

And quoting still further from his language at the foot of the same page: "We are not aware of any case in which *Hadley v.*

Baxendale has been acted on in such a way as to afford an answer to the learned author's doubts." (This refers to the doubts of Mr. Mayne in his work on Damages, p. 10, 2d ed., by Lumley Smith); "and in *Horne v. Midland R. Co.*, L. R. 8 C. P. 131, much that fell from the judges in the Exchequer Chamber tends to confirm these doubts. But we do not think it necessary here to decide any such question."

The latest English case I have met with is that cited on the argument of *Grébert-Borgnis v. Nugent*, 15 Q. B. D. 85, in which the case in L. R. 9 Q. B. 473, from which I have made the above copious extracts, is approved of.

It appears to me the opinions of the judges in this case show that more must be established than has been shown to entitle a party to recover as damages what he has lost through his own breach of contract, caused or brought about by the failure of the defendant to perform his obligation.

Brett, M.R., at p. 89, thus states his opinion of the result of the cases cited on the argument, supposed to carry out the principles of *Hadley v. Baxendale*: "Where a plaintiff under such circumstances as the present is seeking to recover for some liability which he has incurred under a contract made by him with a third person, he must show that the defendant at the time he made his contract with the plaintiff, knew of that contract, and contracted on the terms of being liable if he forced the plaintiff to a breach of that contract. If such sub-contract was not made known to him at all, the defendant cannot be made liable for what the plaintiff has had to pay under it. If there be no market for the goods, then the sub-contract of the plaintiff, although not brought to the knowledge of the defendant, the original vendor, may be put in evidence in order to show what was the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value. But where the sub-contract was fully made known to him in all its terms, in my opinion the defendant would be liable; and the proper inference, and one which the jury might well infer, would be that he had contracted with the plaintiff upon the terms that if he broke his contract he should be liable for all the consequences of a failure by the plaintiff to perform his sub-contract. Still, however, it seems to me, according to what has been decided, that the original vendor, in such a case as this, is only to be liable, in the case of a breach of contract, for the natural consequences of so much of the sub-contract as was made known to him." Then putting a suppositional case, he adds: "It seems to me that the cases establish that the original vendor is to be liable to so much of the sub-contract as was made known to him, but only to that extent.

Bowen, L.J., at page 92, said: "A person can only be held to be responsible for such consequences as may be reasonably sup-

posed to be in the contemplation of the parties at the time of making the contract. That is the principle really at the bottom of *Hadley v. Baxendale*, 9 Ex. 341. Now, how much of the damages claimed may reasonably be supposed to have been in the contemplation of the parties at the time of making the contract, depends in every case upon how much of the real situation of the parties was so disclosed by the purchaser to the vendor at the time the contract was made, as to render it a fair inference of fact that damages of that class were intended to be recouped if they were suffered.

The evidence in the present case, with respect to notice of the plaintiffs' contract, amounted to no more than this: Mr. Shepard, one of the plaintiffs, visited Montreal in February or March, 1882; and then in another memorandum, not proved or produced at the trial, instructed Messrs. Kirk, Lockerby & Co., as to the existence of the plaintiffs' special contract with the railway company by which the goods in question should have been forwarded. It did not appear that Kirk, Lockerby & Co., were informed of the special terms made, or of more than that there was a special rate.

Mr. McLean one of the firm of Currie & McLean, swore the goods were simply ordered to be delivered at Milwaukee. "The only special circumstance or reason that I know of was what I was told by Kirk, Lockerby & Co., that there was a special rate from Milwaukee to destination. There was no communication or notification other than I have mentioned as being told me by Kirk, Lockerby & Co. There were stamps on the bills of lading when I signed the rate, which are the stamps which I now see on the bills."

On cross-examination, in answer to the question: "You stated that the special rate beyond Milwaukee was mentioned only incidentally?" he said: "I believe it was; I do not remember that they laid any stress upon it. It was immaterial what the rate was beyond. I took the freight to be carried to Milwaukee. I did not think any more about it. I believe I mentioned it to the captain of the boat. I would not swear positively that I did; but I believe that I did. I think I remember mentioning it on the wharf; That is my recollection of it. I am almost positive that I did; but I would not swear to it."

Can it be reasonably inferred from this evidence that it was in the contemplation of Currie & McLean (whose contemplation must, I think, be taken to be that of the defendant), and of Kirk, Lockerby & Co., that if the goods were not forwarded by the Chicago, Milwaukee & St. Paul Railway the defendant would be bound to make good any loss that might be occasioned to the plaintiffs thereby; or that the cost of transport by Duluth, a much shorter distance and from which the ordinary rate is less, would be greater than by Milwaukee? The main object of the contract

was, that the goods should be carried not to Milwaukee merely but to Flat Creek, when the evidence, outside of the bill of lading, prepared by Kirk, Lockerby & Co., is considered; and the bill of lading also shows, though the contract expressly undertaken by it was only to carry to Milwaukee, the goods were addressed to the plaintiffs at Flat Creek.

The measure of damages furnished by the evidence is either nominal or the full amount paid by the plaintiffs in excess of the MEASURE OF DAMAGES. amount they would have paid under the special rate they had contracted for. But the last measure can, I think, only be adopted, without disregarding *Horne v. Midland R. Co.*, L. R. 8 C. P. 131, on the assumption the evidence establishes the defendant had notice of the terms of the special contract, and contracted with the plaintiffs in reference thereto, as Brett, M.R., puts it in *Gérbert-Borgnis v. Nugent*, 15 Q. B. D. 85, in the extract I have above made from his judgment.

The evidence, to my mind, clearly establishes that the defendant, not negligently but wilfully, sent the goods by Duluth instead of Milwaukee, but they reached their destination as quickly or more quickly than they would have done by Milwaukee, and also for less freight, were it not for the plaintiffs' special agreement with the railways running from Milwaukee. By his wilful disregard of his contract he should properly be held responsible for all damages that, under the law, may reasonably be awarded against him; and, if he had sufficiently specific notice of the plaintiffs' contract, so that it might fairly be assumed that contract he made to carry the goods was made in reference to the contract, the sum awarded by the learned Chief Justice would be the correct amount.

The defendant has objected that under no circumstances are the plaintiffs entitled to interest. But by the defendant's improper breach of his contract the plaintiffs paid a large sum of money, which, if they are entitled to recover from the defendant, the defendant ought to have repaid them immediately, and the defendant has had the use of the money he ought so to have paid over, since, and the plaintiffs have lost its use. So in fairness the plaintiffs should be allowed interest as an enhancement of the damages.

Mr. McKelcan on the argument objected that the plaintiffs had not the right to recover because the bill of lading on which the plaintiffs' action is based was made in Quebec, out of BILL OF LADING. FOREIGN LAW. the Province, and the bill therefore has only the effect it would have had by the custom of merchants previous to the Act of this Province, 33 Vic. ch. 19; R. S. O. ch. 116, as that act cannot apply to the Province of Quebec.

This contention is not entitled to prevail, as the defendant has not pleaded that the contract was made in Quebec, nor has he proved that the law of Quebec is different from the law in this

Province; and, in the absence of such proof, it must be assumed to be the same: *Toponce v. Martin*, 38 U. C. R. 411.

The present Chief Justice of the Queen's Bench Division, in delivering the judgment in that case, at p. 429 says: "But when we adjudicate upon foreign law we adopt for the occasion that law as part of our own law, and we may act on the law of the foreign country being the same as our own in this respect, unless it be averred and shown to be different, and it is for the person setting up such difference to establish it."

For this opinion a number of authorities are cited, which directly, or by inference, fully sustain it. If the evidence showed what the law of Quebec was on the subject, an amendment of the pleadings might be allowed; but as it is there is nothing to amend by.

In this connection it may be remarked that the plaintiffs do not in their statement of claim aver that the defendant had notice of the special contract in respect of which their special damage is claimed, which they ought to have done.

The objection to the evidence of the plaintiff Shepard as to his instructions to Messrs. Kirk, Lockerby & Co., concerning the special rate, is perhaps well taken, those instructions having been sworn to have been in writing. But what those instructions were is unimportant, as the plaintiffs' right does not depend upon what the plaintiffs instructed Messrs. Kirk, Lockerby & Co., but on what Messrs. Kirk, Lockerby & Co. gave the defendant, through his agents, notice of. The plaintiffs sue on the contract made by Kirk, Lockerby & Co., by the bill of lading, by virtue of R. S. O. ch. 116, sec. 5.

The result of my opinion is, the plaintiffs' judgment should be reduced in amount to nominal damages; but as the defendant was guilty of a wilful breach of his contract, the plaintiffs ought not to pay costs; and judgment should be entered for the plaintiffs for one shilling damages, without costs to either party.

GALT and ROSE, JJ., concurred.

Judgment accordingly.

Liability of Carrier for Changing Route designated by Owners of Goods.—See *Bird v. Georgia R.*, 27 Am. & Eng. R. R. Cas. 39; *Snow v. Indiana, B. & W. R. Co.*, and note, 28 Ib. 77-81.

Carriers' Liability for Damages Not within the Contemplation of Parties Contracting.—See *Hamilton v. Western North Carolina R. Co.*, and note, *supra*.

ILLINOIS CENTRAL R. Co.

v.

HAYNES.

(Advance Case, Mississippi. April 11, 1887.)

The plaintiff shipped some cattle over the defendant road to New Orleans. Owing to press of business, the defendants were delayed in delivering the cattle at their destination, and some of them were injured. On the trial of a suit against the railroad for damages, the court instructed the jury that the railroad company was under duty to carry within a reasonable time.

Held:

1. That the error in giving this instruction was not material, as the jury were told in another instruction that, in determining what was a reasonable time, all the surrounding circumstances should be kept in view, and that a delay caused or occasioned by an unusual and exceptional press of business was not to be considered as unreasonable.

2. That after a witness had been asked on cross-examination if he had not sued defendant for damages arising out of the same delay, it was proper, on redirect examination, to ask him if his suit had not been settled.

3. That the court did not err in permitting the plaintiff to contradict the conductor of the cattle train, by proving against his statement previously made, that he would testify as favorably as possible for the defendant, which declaration he denied that he had made.

4. That interest from the date of the contract (if the suit is considered as *ex contractu*) or from the date of the injury (if the action be viewed as one in tort) may be allowed if plaintiff recovers damages.

APPEAL from circuit court, Attala county.

Appellee, Haynes, shipped some cattle by appellant's road from Kosciusko to New Orleans, under a special contract which permitted Haynes to go along on the same train, and gave the further right to Haynes to demand that his cattle should be side-tracked to be watered and fed, when he so determined. Railroad was to deliver the cattle in New Orleans without delay, within a reasonable time. This was at the time of the Exposition in New Orleans, and the road was much crowded with business. The railroad failed to deliver the cattle in good condition. Some of them were injured, and Haynes failed to realize their worth, and he brought this suit against the railroad for damages. On the trial Haynes testified that he twice asked the conductor of the train to side-track the car containing his cattle, so that he could water and feed them. One Wood, a witness for the plaintiff, testified that he had cattle on the same train, and that Haynes did ask the conductor to side-track his cattle. On cross-examination, counsel for the railroad asked this witness, Wood, if he had not also sued the railroad for damages to his cattle. He answered, "Yes;" and

on redirect examination Wood was asked, and was permitted to answer over the objection of the defendant, that the railroad company had settled with him. Plaintiff introduced testimony to prove that Byrnes, the conductor, had stated before the trial "that he would tell the best story possible for the railroad in order to keep his job." Byrnes had denied on his examination that he had said this. A trial was had, which resulted in a verdict and judgment for Haynes, from which the railroad company appealed.

W. P. and J. B. Harris for appellant.

Allen & McCool for respondent.

COOPER, C.J.—The instructions are not contradictory, and, on the whole case, fairly presented the law to the jury. Looking only to the instructions for the plaintiff, it might be said that the jury was not sufficiently told what was reasonable expedition of the freight carried, but this defect is INSTRUCTION AS TO REASONABLE TIME. fully supplied by the full and accurate instructions for the defendant, and it is impossible that the jury could have failed to understand the rule announced. By plaintiff's instructions, the jury was told that the defendant was under a duty to carry, within a reasonable time; but by those given for the defendant it was also informed that, in determining what was a reasonable time, all the surrounding circumstances must be kept in view, and that a delay caused or occasioned by an unusual and exceptional press of business was not to be considered as unreasonable.

We think the defendant cannot complain of the instruction by which the jury was told that the plaintiff was entitled to interest from the date of the breach of the contract (if the suit be considered as one for breach of contract), or from the date of INTEREST ON DAMAGES. the injury, if the action be viewed as one in tort. It was not error to permit the plaintiff to ask the witness Wood whether the defendant had settled the suit which he had brought against it for damages done to his cattle carried on the same train. If this evidence had been drawn from the witness on direct examination, objection might have justly been taken thereto. But the defendant, for the purpose of proving this witness to be unfriendly to it, had asked him if he had not brought suit against it to recover damages for a similar injury. The purpose of the testimony then drawn out by the plaintiff was to show that no reason existed for unfriendly feeling, since the suit had been settled between the parties. The court did not err in permitting the plaintiff to contradict the witness Byrnes by proving against him his statement previously made, that he would testify as EVIDENCE TO CONTRADICT WITNESS. favorably as possible for the defendant, which declaration he denied that he had made. The general rule is that where one, on cross-examination, asks a witness an immaterial question,

he cannot contradict the answer given, but must content himself with the reply given. But where the purpose is to show motive or bias in favor of one party, or against the other, the rule does not prevail. Such, we think, was the character of the declaration made by the witness Byrnes as testified to by the plaintiff. We do not understand that, under such circumstances, the witness must be asked whether he has or has not a bias. It is sufficient to inquire of him whether he has or has not made the declaration; for *res ipsa loquitur*. *Newcomb v. State*, 37 Miss. 383; *Attorney-general v. Hitchcock*, 1 Exch. 91; *Edwards v. Sullivan*, 8 Ired. 302.

We think there is no error in the record, and the judgment is affirmed.

Liability of Carrier for Delay occasioned by Press of Business.—See *Houston & T. C. R. Co.*, and note, 22 Am. & Eng. R. R. Cas. 421-427; *Chicago, etc., R. Co. v. Dawson*, 18 Ib. 521.

Allowance of Interest in Actions against Carriers.—In estimating the damages to be recovered in actions against carriers, interest is usually allowed on the amount recovered from the time when the goods should have been delivered. *Kyle v. Laurens, etc., R.*, 10 Rich. (S. Car.) 382; *Robinson v. Merchants' Transp. Co.*, 45 Iowa, 420.

Interest runs from the date of the judgment, not from the date of the verdict. *Quarrier v. Baltimore R.*, 20 W. Va. 424; s. c., 18 Am. & Eng. R. R. Cas. 535. See generally *Arthur v. Chicago, etc., R.*, 16 Am. & Eng. R. R. Cas. 283.

But the allowance of interest is, to some degree, within the discretion of the court, and where there has been no negligence on the carrier's part, the recovery of interest is not permitted. *Gray v. Missouri River Packet Co.*, 64 Mo. 49.

WALLINGFORD *et al.*

v.

COLUMBIA AND GREENVILLE R. Co.

(*Advance Case, South Carolina. March 11, 1887.*)

The plaintiffs shipped certain live stock from Bloomington to Louisville station on the Louisville, New Albany & Chicago R. Co., under a special contract, their ultimate destination being Abbeville Court House, S. C. The carriage over the latter part of the distance between Louisville and the ultimate destination was performed by the defendant company. At a point on the defendant's line, where the stock was placed in another car, they were found to be greatly injured, alleged by the plaintiff to have been caused by the defective box-car in which they had been transported, and the negligence of the engineer. The company claimed exemption from liability under the contract between the Louisville, N. A. & C. road and the plain-

tiffs, and also on the ground that the defective car in which the stock was injured was received from another road. *Held*:

1. That it was no defence that the defective car belonged to a connecting carrier.

2. That by proving the fact of shipment and injury the plaintiffs made out a *prima facie* case, and the burden is on the company to prove that the damage resulted from some cause for which, by lawful contract or common law, it was not liable:

3. That after the plaintiffs had made out a *prima facie* case, and the defendant's only evidence to overthrow it was the testimony of one of plaintiffs' witnesses on cross-examination, together with a contract shown him by defendant, and claimed to be the real contract between the parties, it was proper for the court to refuse a nonsuit on the motion of the defendant, as it is not the province of the court to determine conflicting evidence.

4. The laws of South Carolina do not permit a common carrier to exempt himself from liability for negligence.

5. That a charge that if the jury believed from the evidence that the defendant and the connecting road were partners in shipping the stock, then the defendant could be bound only by the terms of the contract under which it was shipped over the connecting road, was properly refused, as such a request required the court to assume that the connecting line had shipped the stock under the special contract, which was a question of fact for the jury, and because, admitting the existence of the contract, the issue was one of negligence, from which no contract could shield the defendant.

6. That it was proper that the court charged that the contract of defendant as common carrier required it to deliver the stock at their destination free from injury, except as stated; and if it failed to do so, it should respond in damages sufficient to make good their value uninjured at that point.

7. That a provision in the contract of shipment, that the shipper accepted the car provided, did not protect the company.

APPEAL from circuit court, Abbeville county.

Benet & Smith and *John C. Haskell* for appellant.

Parker & McGowan for respondents.

SIMPSON, C.J.—The plaintiffs (respondents) some time in 1884 shipped certain live-stock on the Louisville, New Albany & Chicago R. Co., under a special contract, from Bloomington to Louisville Station, the destination of the stock being Abbeville Court House, South Carolina. From Louisville Station FACTS. the stock reached Seneca City, S. C., via Atlanta, Ga. From Seneca they were transported by the defendant company to Hodges in the same car in which they came from Atlanta, and thence to Abbeville Court House. The freight was paid at Abbeville to the agent of defendant company at that point. The stock was found greatly injured at Hodges, alleged by the plaintiffs to have been caused by the defective box-car in which they had been transported, and the negligence of the engineer; and at Hodges two of said horses fell between the cattle-shute and the car, because of negligence in building the shute too far from the track, causing injury. Upon full hearing the jury found for the plaintiffs \$450. The appeal raises no question as to the fact of injury, nor as to the

amount of the damages, nor is it denied that said injury was occasioned in consequence of the defective car in which the stock was transported. These facts, it is agreed, were established by the verdict. The defendant claims exemption, however, under a contract in writing between the Louisville, New Albany & Chicago R. and the plaintiffs, introduced in evidence on the cross-examination of plaintiffs' witness, and also upon the ground that defendant company should not be responsible for the defective car in which the horses were transported from Seneca to Abbeville; it being the same car in which they had come from Atlanta. The defendant moved for a nonsuit at the close of the plaintiffs' testimony, which was refused.

The appeal involves a question of error assigned to this refusal, and also the refusal to charge certain propositions requested, and certain propositions charged, on the two matters above, to wit, the written contract, and the defendant's responsibility for the defects in the Atlanta car. The motion for nonsuit was made upon two grounds:

"First, because the plaintiffs failed to adduce any evidence of negligence on the part of the defendant, inasmuch as the defendant had merely hauled the car received from the connecting railroad, the air-line; the defects which caused the injuries

CARRIER NOT
PROTECTED BY
FACT THAT CAR
BELONGED TO AN-
OTHER COMPANY.

alleged being in said cars." This assumed (which was no doubt true) that the car was dangerously defective when the defendant company received it at Seneca City, and that the injuries sustained resulted from said defect. The responsibility of a common carrier is to transport safely and securely, which includes, as to railroad common carriers, the necessity of having safe appliances, cars, machinery, etc.; and we know of no principle of law which would allow them, when damage is done by a defective car, to shield themselves upon the ground that said car belonged to and was used by another company. When the car here was received by the defendant, it was adopted as a part of the defendant's train, and defendant then became as fully responsible for its character, etc., as if it were their own car. It would be a very dangerous doctrine, indeed, to say that because one railroad company had gone through with defective and dangerous cars, passenger coaches, etc., without damage, that therefore another company, using said defective car with damage, should escape liability. The case of *Felder v. Columbia & G. R. Co.*, 21 S. Car., 35, relied on by appellant, has no application here, as we conceive. In that case the effort was to make the defendant liable as a joint contractor with a connecting line (evidenced by the sale of a through ticket), whereby it was sought to make the defendant responsible for the default of another. But here the effort was to make the defendant responsible for injury done on its own road, resulting from its own negligence in transporting the

stock in a dangerous car, and not for the negligence of another. We do not think that the fact that the car in question was an Atlanta car relieved the defendant, and therefore left the case without sufficient testimony to go to the jury.

"Second, because the plaintiffs offered no evidence to show that they had complied with the terms and conditions of the contract entered into between them and the defendant, but that, on the contrary, plaintiffs' testimony proved they had not complied with said terms and conditions."

NONSUIT NOT
GRANTED ON AC-
COUNT OF NON-
COMPLIANCE
WITH THE CON-
TRACT.

One defence of the defendant was that there was a written contract between the plaintiffs and defendant containing certain stipulations which had not been complied with by the plaintiffs. The fact of their being such a contract between the parties was denied by the plaintiffs; they contending that said contract was between themselves and the Louisville, New Albany & Chicago R. Co. with reference to the transportation of the stock from Bloomington to Louisville station, and no further. This was a question of fact, in part at least, and was a matter of defence. It is claimed, however, that it was introduced by defendant during the plaintiffs' testimony, in the cross-examination of one of their witnesses, or at least that it was in before the defendant was put to the defence. A nonsuit is proper when there is a total absence of evidence as to some one or all of the material allegations in the complaint constituting their cause of action. Here the plaintiff relied upon certain alleged facts as constituting their cause of action, and introduced testimony in support of these allegations. The defendant claimed, as matter of defence, that plaintiffs' real cause of action, if any, was the contract which defendant interposed; and that, having failed to show compliance with this contract on their part, they should be nonsuited. This seems to us to be stretching the doctrine of nonsuit further than ever claimed before. It amounts to this: that if, by some accident or skill in defendant's attorney, he can get in evidence during the plaintiff's testimony in support of his defence, that then, unless plaintiff shall overthrow by affirmative proof said defence before he closes, he shall be nonsuited. The objection to this proposition is that there would be too many facts taken from the jury, and left to the court. Before the court could act it would first have to find, as matter of fact, that the defence had been established, because the plaintiff is not called upon to meet the defence until it is proved, at least *prima facie*. In nonsuits the court is not authorized to weigh evidence, but to determine whether any evidence has been introduced. Here, then, even admitting that there was a contract, and that the defendant had proved it in the opinion of the court, yet the plaintiffs had the right to go to the jury on that question as a matter of fact, and the judge could not assume it, thus taking it away from the jury,

and then nonsuit the plaintiff, because there was a total absence of testimony to overthrow it, or, in this instance, a total absence on the point whether plaintiffs had complied with the stipulations contained in the contract.

This brings us to the exceptions complaining of his honor's refusals to charge.

Before discussing these exceptions, it would be well to state some of the principles of law applicable to common carriers, about which there is little or no doubt. At common law there is no exemption to the liability of common carriers for goods, etc., intrusted to them, except for an act of God or of the king's enemies. They are regarded as insurers as to all else. In England, however, and in several of the States of this Union, including our own (South Carolina), the common-law doctrine was modified to the extent of allowing a common carrier to exempt himself from this broad liability by special contract, as to certain specified causes of injury. See, in this State, *Swindler v. Hilliard*, 2 Rich. 286, and *Baker v. Brinson*, 9 Rich. 202, and other cases which need not be cited. It was, however, held in all of the cases that he could not shield himself from the consequences of negligence by a contract; that his character as common carrier could not be changed by contract; only his liability, to the extent of the specified exemptions, was diminished. In all things else the general doctrine of common carriers applied, and especially as to negligence; and, further, that the *onus* was upon him to bring himself by the testimony within the exemptions mentioned in the contract.

Judge Evans, in the case of *Swindler v. Hilliard*, *supra*, said: "It would seem from the recent cases of *Hollister v. Nowlen*, 19 Wend. 234, and *Cole v. Goodwin*, Id. 251, that in New York a carrier is not allowed by a special contract to lessen the liabilities which the common law attaches to his employment. But I think, notwithstanding what is said in those cases, the contrary opinion has prevailed in England for many years past. That it is the acknowledged law in most of the American States, and is recognized in this State in the case of *Patton v. McGrath*, Dud. (S. Car.), 159, . . . there is no difference of opinion in the court, and I deem it unnecessary to say more on the subject." It was held in that case that common carriers could not, by any special contract or agreement, exempt themselves from liability for negligence; and that, where a contract was made, the *onus* of showing, not only that the cause of the loss was within the terms of the exception, but also that there was no negligence, lies on the carrier.

After these cases, and as late as 1872, by act of the legislature even the right of exemption by special contract was abolished, which restored the common-law doctrine in its full force; but in the act of 1882 the terms "special contract," found in the act of

1872, were left out, thereby reinstating the law as announced in said cases above. During the interval the case of the Piedmont Mfg. Co. v. Columbia & G. R. Co., 19 S. Car. 353, was heard by this court, in which the stringent common-law doctrine was held to be the law of this State, with no right on the part of the common carrier to exempt himself; the act of 1872 expressly prohibiting it. Since the act of 1882, which is now of force, we conceive that the law announced in the cases *supra* must control, as we have already said above.

In the case at the bar the defendant interposed two defences, as stated—First, that the stock of plaintiffs was transported under a special contract, which had not been complied with on the part of the plaintiffs; second, that defendant should not be held liable for the defective car under the circumstances.

Exceptions 5, 6, 10, 11, and 13 assign error to the circuit judge in refusing to charge and in charging certain propositions therein stated as to the contract relied on by the defendant. We will take these up first, as they all belong to the first defence.

Exception 5: "Because his honor refused to charge that if the jury was satisfied from the evidence that defendant company and the air-line railroad company were part-
ners in the transactions of transporting the stock, then the defendant company could be bound only by the terms of the contract under which the said car-load of horses was transported over the air-line railroad."

INSTRUCTION AS
TO LIABILITY OF
DEFENDANT UN-
DER THE CON-
TRACT—NOT ER-
ROR TO REFUSE.

Exceptions in a case at law are intended to present some principle of law violated by the judge, either in refusing to charge or in charging. There is no principle or legal proposition distinctly stated here, and claimed to have been violated. There is a state of facts mentioned under which, if the jury found them to exist, the appellant claimed that the judge should have charged that appellant could only be bound to a certain extent, to wit, upon the terms of the contract. But upon what principle? We suppose upon the principle that the individual members of a copartnership transaction can only be held liable as the copartnership as a whole would be held, to wit, according to the contract made. The judge, in refusing the request, did not violate this principle—First, because, even supposing that the jury might find these two companies partners, the request required the judge to assume that the air-line railroad had transported the stock of plaintiffs under the special contract, which was a question of fact in part depending upon the evidence, and, being such a question, the judge had no right to assume it; and, second, because, admitting that both of these companies transported the stock under the contract, the action was against common carriers, founded upon alleged negligence, and that was the issue presented by the plaintiffs; and the contract, as we have seen, could in no event shield the defendant

from negligence. A common carrier is bound to deliver the property which he undertakes to transport, at the point of discharge, safe and uninjured, at the peril of liability, except where the injury has resulted from some cause excepted in a contract (other than negligence), which is a matter of defence, the *onus* of proving which is upon the defendant. The plaintiff has nothing to do but to show the injury, and the defendant becomes at once *prima facie* liable, and remains so until he shows that said injury resulted either from an act of God, the public enemies, or a cause from which he had exempted himself legally in a special contract. This being the law, the judge here could not have charged that the defendant was shielded by the contract, even supposing the transportation was made under it, because that would have assumed that the cause of the injury was an excepted one, and that the defendant had proved it; thus invading the province of the jury.

The sixth exception is similar to the fifth, except it went a step further, and requested the judge to charge that, if there was a special contract, then the defendant lost the character of a common carrier, and became a private carrier for hire, and his liability depended entirely upon the terms of the contract. This is directly against *Baker v. Brinson, supra*, where it was said by the court, in terms, that a contract does not change the character of the common carrier, and that as to negligence, and all else but the exceptions, the common law applies; the contract only relieving him to the extent of the legally excepted causes of injury, which, we repeat here, he must show were legally excepted, and that the injury resulted from them.

(10) Because the judge erred in charging that the contract was an agreement between the plaintiffs and the Louisville, New Albany & Chicago R., only between Bloomington and Louisville. Whether the contract was entered into was a question of fact. Its construction was for the court. We think the judge was correct in construing it as he did. His construction is sustained by the express language of the instrument.

(11) Because his honor erred in charging that the contract in question was not binding unless it was proved that plaintiffs understood the terms thereof. We do not find in the charge anywhere that his honor used the precise language complained of. The judge said, in general terms, that an agreement, to be binding, must be assented to and understood by both parties. This is certainly good law as appears from the very definition of a contract.

(13) Because his honor erred in charging that a common carrier could not limit his liability as a common carrier at common law even if he proved that he attempted to do so. Here, again, we have failed to find that his honor charged as specified. He did say that there could be no limitation "for negligence," and in this, as we have shown above, there was no error.

OTHER INSTRUCTIONS
CONSIDERED.

Now as to the exceptions upon the other branch of the defence, to wit, 3, 4, 7, 8, 9, 14 and 15. The third and fourth exceptions, as we understand them, contend that if the defective car was furnished to the defendant company by the air-line railroad company, that defendant company could not be held liable unless it was proved to the satisfaction of the jury that said companies were partners. This position has been met above in substance, as we hold that the defendant can claim no exemption on the ground that the defective car came to them from the air-line road, whether they were partners or not. The defendant is sued here for its own alleged negligence. That the car was defective was a matter for the jury under the evidence on the question of negligence. And it makes no difference where it came from. For the time being it was the car of the defendant, which it was bound to see was suitable and safe.

(7) Because his honor erred in refusing to charge that if plaintiffs accepted, at Atlanta, the car by the defects of which injuries were inflicted on the horses, then the plaintiffs contributed, by their negligence, to their injury, and cannot recover damages. As has been said above, a common carrier is EFFECT OF PLAINTIFF ACCEPTING CAR. an insurer against all injury except such as results from the act of God or the public enemies, and in this State, except such as may be caused by something which in law he can and has exempted himself from by a special contract. The injury here did not result from any cause of the kind mentioned. The contract relied on did not exempt the defendant from liability for a defective car if accepted by the plaintiffs, even if the contract had been between the parties. It is true that it contained a provision that the plaintiffs should accept the cars provided by the company, but the plaintiffs did not assume all risk arising from defective cars. Nor did the fact of acceptance dispense with the legal necessity in the company to furnish safe and secure cars. The judge, therefore, could not have properly charged the request.

Eighth exception : That his honor decline to charge, upon request, that plaintiffs should not simply show negligence only, but should also show that the injury complained of resulted from this negligence. That is good law in a case where negligence is the gist of the action, with the onus of proving it affirmatively on the plaintiff, as in *Glenn v. Railroad*, 21 S. C. 466. But in a case against a common carrier like the one at bar, where the defendant is liable unless he proves that the injury was occasioned by a cause which, under the principles above, he is exempt from, it has no application.

The ninth exception has been disposed of above ; also the fourteenth.

Fifteenth and last : That his honor erred in instructing the jury as to the measure of the damages, to wit, the value of the horses

killed at the place of destination or delivery, and the actual damages incurred on account of injuries to the others. The horses reached the point of delivery. The contract of the defendant as common carrier required it to deliver them at Abbeville free from injury, except as stated, and upon failing to do so it necessarily followed that they should respond in damages sufficient to make good their value uninjured at that point. This seems to have been the charge of the judge in substance. He had already ruled that the contract did not apply, which we think was the correct construction from its terms. Therefore he could not have charged that the stipulation therein as to the value of the stock at the place and date of delivery should govern.

It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER and McGOWAN, JJ., concur.

Power of Carrier to Limit Liability.—See *Grogan v. Adams Ex. Co.*, *ante*.

Liability of Carrier for Negligence of Connecting Line.—See *Leo v. St. Paul, etc., R. Co.*, 12 Am. & Eng. R. R. Cas. 35; *Berg v. Atchison, etc., R. Co.*, 16 Ib. 229; *Denning v. Norfolk, etc., R. Co.*, 16 Ib. 232; *Lotspeich v. Central R. & B. Co.*, 18 Ib. 490; *Hot Springs R. Co. v. Trippe*, 18 Ib. 563; *Pereira v. Central Pac. R. Co.*, 18 Ib. 565; *Hewett v. Chicago, etc., R. Co.*, 18 Ib. 568; *Peterson v. Chase*, 18 Ib. 578; *St. Louis Ins. Co. v. St. Louis, etc., R. Co.*, 3 Ib. 260; *St. Louis, etc., R. Co. v. Larned*, 6 Ib. 436; *Harding v. Int. Nav. Co.*, 6 Ib. 588; *Knight v. Providence, etc., R. Co.*, 9 Ib. 90; *Block v. Erie, etc., F. F. Line*, 21 Ib. 1 and note; *Atchison, etc., R. Co. v. Roach*, 27 Ib. 257; *Savannah, etc., R. Co. v. McIntosh*, 27 Ib. 269.

Duty of Carriers to Furnish Safe Cars and Appliances.—The carrier is bound to provide safe and suitable cars and appliances for transporting livestock. Catle-cars must be sufficiently strong to resist their struggles, and the carrier is liable for loss occasioned by his negligence in this regard, in spite of the fact that the animals may be vicious and unruly, upon the principle that it is within his power to provide those which are actually and absolutely sufficient. *Smith v. New Haven, etc., R. Co.*, 12 Allen (Mass.), 531; *Pratt v. Ogdensburg R. Co.*, 102 Mass. 557; *Indianapolis, etc., R. Co. v. Strain*, 81 Ill. 504; *St. Louis, etc., R. Co. v. Dorman*, 72 Ill. 504; *Indianapolis, etc., R. Co. v. Jurey*, 8 Bradw. (Ill.) 160; *Wabash, etc., R. Co. v. Black*, 11 Bradw. (Ills.) 465; *Harris v. Northern Indiana R. Co.*, 20 N. Y. 232; *Welsh v. Pittsburg, etc., R. Co.*, 10 Ohio St. 65; *Hawkins v. Great Western, etc., R. Co.*, 17 Mich., 57; s. c., 18 Mich. 427; *Railroad Co. v. Pratt*, 22 Wall. (U. S.) 123; *Rhodes v. Louisville, etc., R. Co.*, 9 Bush (Ky.), 688; *Peters v. New Orleans, etc., R. Co.*, 16 La. Ann. 222; *McDaniel v. Chicago, etc., R. Co.*, 24 Iowa, 412; *Kimball v. Rutland, etc., R. Co.*, 26 Vt. 247; *Shaw v. Great Southern, etc., R. Co.*, L. R. 8 Ir. 10; *McManus v. Lancashire, etc., R. Co.*, 4 H. & N. 327; *Combe v. London, etc., R. Co.*, 31 L. T. 613; *Great Western, etc., R. Co. v. Blower*, 41 L. J. C. P. 268; L. R. 7 C. P. 655. See also *Wilson v. Hamilton*, 4 Ohio St. 722; *Willoughby v. Horridge*, Ad. & El. N. S. 742; 22 L. J. C. P. 90; 17 Jur. 323; *Laws of Kansas*, 1883, ch. 124, sec. 9; *Harrison v. Missouri Pacific R. Co.*, 74 Mo. 364; s. c., 7 Am. & Eng. R. R. Cas., 882.

In *Wilson v. New York, etc., R. Co.*, 97 N. Y. 87; s. c., 21 Am. & Eng. R. R. Cas., 148, the plaintiff shipped two horses by the defendant's road under a contract by which he released the company from liabilities for damages

resulting from the negligence of his servant, or which should be occasioned by the insecurity of its cars. The horses were transported in a grain-car, which was out of repair, and, while sufficient for the use for which it was intended, unsafe for the transportation of live-stock. In consequence of such defect, one of the horses was injured. In action to recover damages, it did not appear but that other safe and secure cars were provided by the defendant, and were on hand ready for use; but that the injury might have been caused by carelessness on the part of its servant, in selecting an insecure car. *Held*, that the only negligence shown was that of defendant's servant, from the consequences of which it was released by the contract, and the plaintiff was not entitled to recover. The above case may be explained by the peculiar state of the New York law in reference to the right of a carrier to limit by contract his liability for negligence. In that State it is clearly settled that the carrier may, by means of a plain and unmistakable special contract, exempt himself from liability for losses arising from any degree of negligence on the part of his servants; yet such contracts, in order to have such effect, must be plainly and distinctly expressed, so that their purport cannot be misunderstood by the shipper. And however broad and general may be the language of the contract which does not specifically and in express terms release the carrier from the consequences of his own negligence, it will not effect such release if the general words may operate without including such negligence. *Condict v. Grand Trunk, etc.*, R., 54 N. Y. 500; *Nicholas v. New York Central, etc.*, R., 89 N. Y. 370; s. c., 9 Am. & Eng. R. R. Cas. 103. See generally *Carriers of Goods*, 2 Am. & Eng. Encycl. of Law, 830 *et seq.*

Liability of Carrier where Consignor Selects Cars.—It seems, however, that if the consignor has made his own selection of vehicles, the carrier will not be liable for defects therein. *Illinois Central, etc., R. v. Hall*, 58 Ill. 409; *Chicago, etc., R. v. Dandreson*, 22 Wis. 511; *Harris v. Northern Indiana, etc., R.*, 20 N. Y. 232. Compare *Peters v. New Orleans, etc., R.*, 16 La. Ann. 222. It has been held that the carrier may, by a provision to that effect in the contract, impose upon the consignor the duty of determining whether the cars and appliances are suitable and safe for the transportation of live-stock. *Squire v. New York Central, etc., R.*, 98 Mass. 239; *Mass.* 239; *Harris v. Northern Indiana, etc., R.*, 20 N. Y. 232. Compare *Welsh v. Pittsburg, etc., R.*, 10 Ohio St. 65.

GULF, COLORADO AND SANTA FE R. Co.

v.

TRAWICK.

(*Advance Case, Texas. May 20, 1887.*)

The contract of shipment between a shipper of live-stock and a railroad company provided that the company should not be liable for loss or damage, except such as arose from wilful negligence of its servants, and that, as a condition precedent to the shipper's right to recover damages for any loss, he should give notice in writing of his claim at a certain place and in a certain time. The contract also limited the time within which the shipper might bring suit for any claim for damage, to less than the time prescribed by the

Statute of Limitations. A Texas statute (Rev. St. art. 278) provides that railroad companies and other common carriers shall not limit or restrict their liability, as it exists at common law, by any general or special notice, or in any manner whatever, and that no special agreement in contravention of its terms shall be valid. *Held:*

1. That, excepting the limitation clause, the agreement was in contravention of the statute and invalid.

2. That the clause limiting the time for bringing suit was valid, and the refusal of the court to instruct the jury as to the effect of the failure of the shipper to institute suit within the time prescribed by the contract, was error.

APPEAL from Lampasas county.

Matthews & Woods for appellant.

A. J. Peeler and *Walter Acker* for appellee.

STAYTON, J.—This action was brought by the appellee to recover damages for injury to cattle while in course of transportation from Navasota to Lampasas; for cattle alleged to have been lost through a defective stock-pen at the place of shipment; and cost of passage for himself,—he alleging an agreement to give him passage free of charge other than that made for transporting the cattle; and that the train on which his cattle were left Navasota without him, through the negligence of the employees of the appellant. The cattle were shipped under a special contract, as it is claimed, at a rate lower than the regular rate. By this contract the appellant sought to make its liability only that of a private carrier, and to release itself from liability for any delay in receiving, shipping, or transporting the cattle, or for injury to them, caused otherwise than through fault or negligence of its officers, agents, or employees. It attempted to bind the shipper to accept such cars as the company might furnish for transportation of the cattle, and to relieve the carrier from liability for loss resulting from heat, suffocation, or other ill effects caused by the animals being crowded in the cars, or on account “of being injured by burning of hay, straw, or other material used by the owner for feeding the stock or otherwise, and all risk of damage which may be sustained by reason of any delay in such transportation, whether occasioned by any mob, strike, or threatened violence to person or property from any source to track or yards, and all risk of escape or robbery of any portion of said stock, or of loss or damage from any other cause or thing not resulting from wilful negligence of the agents of the carrier.” It attempted to bind the shipper to load, unload, and reload the stock at his own risk, and at his own risk to feed, water, and attend to them while in stock-yards, on the cars, and at feeding and transfer points; and it further attempted to impose upon the shipper the duty of seeing that the stock was securely placed in the cars the carrier might furnish, and so to fasten the cars as to prevent the escape of animals therefrom. It also

provided that laborers furnished by the carrier to load and unload the stock should be deemed the employees of the shipper; and that, "*as a condition precedent to his right to recover* any damages for any loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before such stock is mingled with other stock."

The statutes of this State provide that "railroad companies, and other common carriers, of goods, wares, and merchandise for hire, within this State, on land, or in boats or vessels on the waters entirely within the body of this State, shall not limit or restrict their liability, as it exists at common law, by any general or special notice, or by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation, or in any other manner whatever, and no special agreement made in contravention of the foregoing provisions of this article shall be valid." Rev. St. art. 278. That railroads are common carriers is determined by the constitution and laws of this State, as well as by the nature of the business in which they are engaged, is not an open question; and their duties, obligations, and liabilities, resulting from this public character, attach, when animals are tendered or received for transportation, as fully as they do in reference to other classes of property tendered or received for transportation. As has been correctly said: "The law has introduced by implication, into every contract for the carriage of goods, an exception to the carrier's liability, in cases where the loss to them, while in his charge, has been occasioned by the act of God or of the public enemy, or by their own decay from an inherent infirmity, or by the fault of the owner himself. So it has, from the necessity and justice of the case, introduced an exception in favor of the carrier of live-stock, of accountability for its loss or injury resulting from its own uncontrollable, vicious propensities, and the damages incident to its carriage from its inherent natural character." Hutch. Carr. 222. Under the statute of this State, a railway company must receive and transport live animals as other property, and, after receiving, it becomes an insurer of them, as in the case of other property which it is bound to transport, against loss from any cause except the act of God, or of the public enemy, the act of the owner, vicious propensities, or inherent character, or, as it is sometimes termed, the "proper vice" of the animals.

This is the liability imposed upon the common carrier by the common law, and the statute declares that the "liabilities of carriers in this State shall be the same as prescribed by the common law." Rev. St. art. 277. Such

STATUTORY PROVISIONS.

COMMON-LAW LIABILITY OF THE CARRIER.

CONTRACT OF SHIPMENT HELD INVALID.

being "their liability as it exists at common law," the declaration of the statute that they "shall not limit or restrict their liability, as it exists at common law, in any manner whatever," and that "no special agreement made in contravention of the foregoing provisions of this article shall be valid," deprives such carriers of the right to limit their liability by contract, even as to matters in reference to which they might legally contract under the common law. The common-law duties and liabilities, and not those duties and liabilities as they may be affected by contracts lawful under the common law, are the duties and liabilities of common carriers under the statutes of this State, and they cannot be restricted or limited by any contract or agreement whatever, in cases to which the statute is applicable. The rule may seem a harsh one, but, be that as it may, the legislature of this State has established it, and courts have no power or right to refuse to enforce it, or to place a construction on the statute which its language does not authorize. The duties and liabilities imposed upon common carriers are inseverable. A failure of duty resulting in loss to the shipper fixes liability; and if, by contract, duties imposed by the common law may be dispensed with, then a restriction or limitation of the common-law liability would necessarily follow to the extent to which duty existing without contract might be dispensed with by it. *Railway Co. v. Harris*, 2 S. W. Rep. 574. The carriage, in this case, was wholly within this State, and the statute is directly applicable to it. The special contract, in so far as we have given in substance its terms, was invalid, and therefore cannot shield the appellant from any liability that would have existed had it not been made.

The contract further provides as follows: "It is further hereby and herein expressly provided and mutually agreed
LIMITATION
CLAUSE VALID. that no suit or action against this company, for recovery of any claim by virtue of this contract, shall be sustained in any court of law or chancery, unless such suit or action shall be commenced within forty days next after the damage shall occur; and should any suit or action be commenced against this company, after the expiration of the aforesaid forty days, the lapse of time shall be taken and deemed conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding." If this clause of the contract, within the meaning of the statute, does not limit or restrict the liability of the carrier as it exists at common law, it must determine the right of the shipper to maintain this action, unless it contravenes some rule founded on public policy. By "liability, as it exists at common law," we understand to be meant such state and degree of legal responsibility as the common law fixes upon the carrier under a given state of facts. The word "limit" ordinarily means to fix the extent of the subject to which it is applied, rather than to fix

the duration of time within which a right, growing out of the subject, may be enforced; and, as used in the statute, may mean no more than that the carrier shall not relieve himself by contract from obligation to make such full compensation for breach of duty as the common law would impose under the facts in the given case. The word, however, ordinarily has much the same signification as the word "restrict;" but the inference, arising from the use of both words in connection and in relation to the same subject, is that they were not used as exact equivalents. The word "restrict" means "to restrain within bounds;" and, as used in the statute in connection with the carrier's liability before declared, was evidently used to prohibit the carrier from so contracting as to make his liability to depend on facts other than such as would fix liability under the settled rules of the common law. In case of contract, the facts made necessary by it to the existence of legal obligation become restraints or restrictions on legal liability if, in the absence of contract, liability, under the settled rules of the common law, would be fixed by the existence of facts other than made requisite to liability by the contract. The statute fixes the boundaries of fact which will impose liability on the carrier, by making it to depend on the facts sufficient to create it under the rules of common law; and a contract which, if given effect, would defeat liabilities thus arising, would be invalid. A contract, however, which does not in any way, if given effect, defeat the complete vestiture of the rights to recover from a common carrier for a breach of duty that at common law would give it, does not operate as a restriction on the common-law liability of the carrier, even though it may require the assertion of that right by action at an earlier period than would be necessary to defeat it through the operation of the ordinary statutes of limitation.

In the case before us, so much of the contract as sought to limit or restrict the liability of the carrier as it exists at common law being invalid, the liability of the carrier was fixed, and, under the terms of the contract, the shipper might have enforced it by action at any time within forty days after he sustained injury. The statutes of this State only forbidding such contracts as would limit or restrict the common-law liability of carriers, we see no reason why contracts executed upon sufficient consideration, and reasonable in character, looking only to the time within which such liability may be enforced, should not be held valid. There is no rule of the common law which forbids such contracts. In England, and in many of the States of this Union, in which there are not statutes forbidding the making of contracts limiting or restricting the carrier's common-law liability, it has been held that even contracts having such effect were valid if reasonable in character. Under the statutes of this State such contracts, whether reasonable or not, can have no standing; for the simple reason that the com-

mon-law liability of the carrier, and not the liability as the carrier might fix it by contract under the common law, is by the statutes of this State imposed on the carrier. The classes of cases to which we have referred illustrate, however, the fact that, in the absence of statutory prohibition, carriers may make contracts reasonable in their nature. It has been held in many cases that a carrier may make a contract which will relieve him from liability for loss or injury to property received for transportation, unless claim be made within a named period after the loss occurred. *Express Co. v. Caldwell*, 21 Wall. 264; *Dawson v. Railway Co.*, 76 Mo. 516; *Express Co. v. Hunnicutt*, 54 Miss. 566; *Express Co. v. Harris*, 51 Ind. 127; *Westcott v. Fargo*, 61 N. Y. 551.

In these cases the periods within which claim was required ran from five to sixty days, and, under the facts of the cases, the periods were deemed reasonable. It has been held in many cases in which contracts had been made between persons other than carrier and shipper, by which a period shorter than that prescribed by the statutes of limitation had been fixed within which actions must be brought or the right to do so be barred, were valid. *Riddlebarger v. Insurance Co.*, 7 Wall. 389; *Insurance Co. v. La Croix*, 35 Tex. 249; *Wood, Lim.* 80; *Greenhood, Pub. Pol.* 505. In the notes given by those elementary writers cases are fully cited. The unequal position of the carrier and the shipper, and the public nature of the carrier's business, furnish the grounds on which their right to contract as to them seems proper, in the absence of a statute regulating the matter, ought to be denied, and the only grounds on which the reasonableness of their contracts ought to be inquired into. As the statutes of this State do not forbid the making of contracts prescribing a time after which a fixed liability shall not be enforced by action, it seems to us that the only inquiry which can be made in reference to such contracts, when executed upon sufficient consideration, is, are they reasonable? The injuries complained of occurred on May 3 or 4, 1884, and this action was not instituted until 11th November following. The run from Navasota to Lampasas required less than 12 hours. The plaintiff resided at and reached Lampasas on the evening of the 4th of May, 1884, and had means promptly to ascertain the extent of the injury, and no reason is shown why the action was not sooner brought. The defendant pleaded the failure to bring the action within the time prescribed by the contract as a bar to the action, and the sufficiency of this defence was questioned by a demurrer, which the court overruled. This would indicate that the court was of the opinion that the answer set up a good defence, and that the time within which the contract required the action to be brought was reasonable. It seems to us, under the facts of this case, that these conclusions were correct. The court was asked to give an instruction as to the effect of the failure of the plaintiff to

institute an action within the time prescribed by the contract, and this was refused, notwithstanding the court had failed to give any charge bearing on that defence.

We are of the opinion that a charge should have been given upon that subject, and for the failure of the court to do so its judgment will be reversed, and the cause remanded.

Construction of Statutes Restraining Carriers in the Limitation of Their Common-Law liability.—The statute construed in the principal case repealed a former statute on the subject which prohibited notices limiting liability but authorized a special agreement, in writing, signed by the parties or their agents. In *Houston, etc., R. Co. v. Burke*, 55 Tex. 323; s.c., 9 Am. & Eng. R. R. Cas. 59, Gould, J., remarked: "The defence that the company was exempt from liability because of the exceptions or stipulations in the bill of lading, seems to us plainly invalid under the statute. The claim is not only to limit and restrict the liability of the company by provisions inserted in the bill of lading, but to make these provisions relieve them from all liability. For reasons of public policy, and having regard, doubtless, to the 'inequality of the parties; the compulsion under which the customer is placed, and the obligations of the carrier to the public,' the legislation of this State and the previous decisions of our courts held common carriers liable as at common law for all losses 'not occasioned by the act of God or public enemies,' and declare invalid any exceptions or special contract seeking to vary that liability. *Chevalier v. Strahan*, 2 Tex. 215; *Arnold v. Jones*, 26 Tex. 337; see also *Heaton & Bro. v. Morgan's La. & Tex. R. & S. Co.*, court of appeals, 4 Tex. L. J. 375; *Railroad Co. v. Lockwood*, 17 Wall. 357.

The Iowa Laws, 1866, c. 13, p. 121, provide as follows: "In the transportation of persons or property by any railroad or other company, or by any person or firm engaged in the business of transportation of persons or property, no contract, rule, or regulation should exempt such railroad or other company, person, or firm from the full liability of a common carrier, which in the absence of any contract, receipt, rule, or regulation would exist with respect to such persons or property." The Iowa Code, § 1307, provides: "Every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employees of the corporation, to any person sustaining such damage, all contracts to the contrary notwithstanding." Under these provisions it has been held that a contract such as is therein prohibited is void, whether it is with or without consideration. *Brush v. Sabula, A. & D. R. Co.* 43 Iowa, 554. And whether the section of the Code above quoted would be applicable to a contract made in Iowa, but to be wholly performed in another State, *quære*; but it was held applicable to a contract to transport cattle from Clinton, Iowa, to Chicago, on the ground that it was to be partly performed in Iowa. *McDonald v. Chicago & N. W. R. Co.*, 24 Iowa, 412. And the fact that the statutory provision is applicable to contracts for transportation from a point within to a point without, the State does not render it unconstitutional in that respect. *Hart v. Chicago, etc., R. Co.*, 69 Iowa, 485. It does not prohibit a company from providing by contract that it shall not be liable beyond the terminus of its road. *Mulligan v. Ill. Cent. R. Co.* 36 Iowa, 181.

The common-law liability of a common carrier attaches to a carrier of live-stock, so far as the rule is not inapplicable by reason of the peculiar character of the property. Responsibility for the carriage of stock cannot, therefore, be restricted by contract in Iowa. *McCoy v. Keokuk, etc. R. Co.*,

44 Iowa, 424. And a rule or custom limiting liability or injury to all stock, including such as is of especial value as being *blooded*, to the value of *common* stock, is void. *McCane v. Burlington, etc., R. Co.*, 52 Iowa, 600. This section of the Code does not render the carrier liable for loss occurring by the act of the owner. *Hart v. Chicago & N. W. R. Co.*, 69 Iowa, 485.

In Georgia, a statute was passed which provides that no contract limiting the carrier's liability shall be valid unless it has the express assent of the consignor. It has been held in construing this statute that the contract might be by parol. *Purcell v. Southern Ex. Co.*, 34 Ga. 615; *Southern Ex. Co. v. Barnes*, 36 Ga. 532.

South Carolina has a statute providing that common carriers cannot limit their common-law responsibility by any notice or declaration or special contract for or in respect of any goods to be carried by them. See *Piedmont Mfg. Co. v. Columbia, etc., R. Co.*, 16 Am. & Eng. R. R. Cas. 194. But note the South Carolina act of 1882, and the remarks of the court in *Wallingford v. Columbia, etc., R.*, *supra*, p. 40.

In Nebraska, as is provided by the constitution of that State, the liability of railroads as common carriers can never be limited. Hence it has been held that a railroad company cannot, by special agreement, divest itself of its character and general liability as a common carrier; in respect, for instance, to live-stock which it receives for transportation. *Atchison, etc., R. Co. v. Washborn*, 5 Neb. 117.

Notices to the Carrier of Claim for Damages.—Stipulations in the contract of the carrier that notice of any claim for damages shall be given within a specified time, after a loss or injury, or delivery, are customary, and have been construed to be reasonable. They are regarded as a security against fraud upon the carrier.

In *Dawson v. St. Louis, etc., R.*, 76 Mo. 514, it was *held* that a carrier of live-stock might limit his liability by requiring a demand for damages to be made within five days after the unloading of stock.

In *Wabash, etc., R. v. Black*, 11 Ill. App. 465, where a provision in the contract for the transportation of cattle that, in consideration of paying at a reduced rate, any claim for damages should be made in writing, sworn to and delivered to the general freight agent of the railroad at a certain place, within five days from the time the cattle were unloaded, it was *held* reasonable and binding, and none the less so because plaintiff neglected to read the contract before signing it.

In *Sprague v. Missouri Pacific R.*, 34 Kans. 347, it was *held* reasonable for the railroad to stipulate with the shipper of horses that a claim for damages shall be made before the horses are mingled with other stock. See generally, *Goggin v. Kansas, etc., R.*, 12 Kans. 426; *Rice v. Kansas, etc., R.*, 63 Mo. 314; *St. Louis R. v. Cleary*, 77 Mo. 634; s.c., 16 Am. & Eng. R. R. Cas. 122; *Moore v. Great Northern, etc., R.*, L. R. 8 Ir. 95.

An owner may bring his action against the carrier for injury done to his animal while in transit, although he has given no notice to the carrier of the animal's injury, nor offered it to be cared for. *Evans v. Dunbar*, 117 Mass. 546.

The circumstances of each case will play an important part in the judicial construction upon such provisions. In *Rice v. Kansas Pacific R.* 63 Mo. 314, where the consignment arrived at midnight, a verbal notice at the time, and one in writing, three days later, were considered a compliance with the contract, where the stock were removed to premises where the company could examine them. In *Dunn v. Hannibal, etc., R.*, 68 Mo. 868, the stipulation that "claims for loss and damage must be presented in thirty days from date of shipment, in order to receive attention," was held to be too vague because it did not distinctly state that any right of action was to exist after failure to give the notice.

In *Ormsby v. Union Pacific R.*, 2 McCrary (C. C.), 48, where notice required that the claim for damages be made before the stock was unloaded, it was held to be unreasonable and void as applied to an injury from illness which might not be discovered before the removal of the animals from the cars. See also *Chicago, etc., R. v. Abels*, 60 Miss. 1017.

NORFOLK AND WESTERN R. Co.

v.

SHIPPERS' COMPRESS Co.

(*Advance Case, Virginia. April 28, 1887.*)

The defendant railroad company undertook with others to supply to the Shippers' Compress Co. by a certain date a certain number of bales of cotton for shipment to Liverpool, on steamers chartered by the said Compress Co. The cotton was not delivered until several days after the time agreed upon, owing to which delay the Compress Co. was compelled to pay demurrage on the vessels detained. The agent of the railroad company was given timely notice of the effect of a failure to deliver the cotton by the time agreed. The Compress Co. brought suit to recover the amount of the demurrage paid. *Held:*

1. That the subsequent acceptance of the cotton by the Compress Co. was not a waiver of the stipulation as to time, and that it was entitled to recover.

2. That the contract made by the railroad company was not *ultra vires*.

ERROR to corporation court of the city of Norfolk.

Sharp & Hughes and *W. J. Robertson* for Norfolk & W. R. Co., appellants.

Starke & Martin for appellees.

FAUNTLEROY, J.—This is a writ of error to a judgment of the corporation court of the city of Norfolk, rendered FACTS. April 29, 1886, in an action of trespass on the case, pending in the said court, wherein the Shippers' Compress Co. is plaintiff, and the Norfolk & Western R. Co., and certain other bodies corporate, doing business as an association under the name of the Virginia & Tennessee Air Line, are defendants.

The plaintiff is a corporation under the laws of Virginia, with power to charter steamers and other vessels, and to load them with cotton. Under this power it chartered two steamers, the *Liscard* and the *Linhope*, to come to Norfolk to load with cotton for transportation to Liverpool, England. The charter-party provided that the plaintiff should pay demurrage for every day's detention of the said steamers beyond the days specified for their sailing respectively. The Shippers' Compress Co., of Norfolk, Va. having so chartered these said steamers in September, 1881, ad-

58 NORFOLK AND WESTERN R. CO. v. SHIPPERS' COMPRESS CO.

vertised to the shippers or owners of cotton, both local and interior, in printed circulars, headed, "Room and Offers for Liverpool Cotton." In making offers for shipping-room upon these steamers to any one in particular, this blank form thus headed would be filled in with specifications of the number of bales of cotton, the rate of through freight to Liverpool from the port of Norfolk, the day upon which the steamer must sail, and the last day allowed for the cotton proposed to be shipped to be in Norfolk and aboard the steamer in time for her to sail at the time appointed.

The Virginia & Tennessee Air Line, embracing the Norfolk & Western R. Co., with its connections stretching far to the west and southwest, with local agents at important points in the cotton country, had their agent at Norfolk, W. T. Payne (appointed by Mr. Fink, the general manager of the Virginia, Tennessee & Georgia Air Line system), who, in addition to his other duties, had special charge of and conducted the cotton business of the system, as a specialty separate from the general freight business. In this capacity the Shippers' Compress Co. addressed to him sundry of these forms, filled in with specifications, as follows:

"(3) ROOM AND OFFERS FOR LIVERPOOL COTTON.

"W. T. Payne, Esq., Agent Virginia & Tennessee Air Line, Norfolk, Va.—
DEAR SIR: We offer room on the steam-ship Liscard, Bri. nationality, A 1 class, for 300 bales of compressed cotton, at ocean rate 26d., no primage. (1) Ship will sail on October 6, 1881. (2) Cotton must be in Norfolk, October, 4, 1881. (3) This offer of room and rates expires —, 18—

"Respectfully, SHIPPERS' COMPRESS COMPANY.

"BARTON MYERS, Pres.

"Norfolk, Va., September 27, 1881."

Of these offers (of which the foregoing is an example of the others exhibited in the record), Payne, as such agent, formally accepted room for 2450 bales of cotton for the Liscard, with stipulation that it should be delivered in Norfolk by the 18th of October, 1881; and for 2870 bales for the Linhope, to be delivered in Norfolk, October 19, 1881; the said times for delivery having having been so agreed, altered, and adjusted by the contracts of acceptances aforesaid. A large amount of the said cotton so contracted to be delivered by Payne, agent, to wit, 1560 bales, were delivered for the Liscard, after the 18th of October, and 1127 for the Linhope after the 19th October, 1881. In consequence of this delay, the steamers were detained at a cost in demurrage of \$334 for the Liscard, and \$889 for the Linhope, which amounts for demurrage were paid by the Shippers' Compress Co.; and which, with interest from the time of payment, measure the actual loss sustained by the said compress company by reason of the failure of the said Virginia & Tennessee Air Line to deliver the cotton at the times agreed on.

Finding that the cotton was being delivered slowly, and finding that it would not arrive in due time, Myers, president of the compress company, frequently saw Payne, agent, and urged him to get the cotton to Norfolk, telling him that the steamships would be on demurrage for detention after the days appointed for their sailing; and on the 17th of October, 1881, he addressed to Payne a letter stating that he would be required to indemnify the compress company from whatever loss might arise from the delay, and giving the demurrage per day on each vessel; which letter he sent to him by his clerk, and on that day Payne sent the following telegrams:

“NORFOLK, VA., October 17, 1881.

“To J. R. Ogden, G. F. A., Knoxville, Tenn: Parties have given us notice that we must pay one hundred and fifty dollars per day demurrage for steamers waiting for our cotton engaged to be here at our stated time.

“W. T. PAYNE, Agent.”

“B. Hughes, Agent, Memphis, Tenn., October 17, '81: If Liscard is not in time, we have notice of one hundred and fifty dollars per day demurrage until it arrives. Parties cannot get cotton to take its place at this late day. We must stop the business, if we propose to do it in this way. Better hurry cotton along.

W. T. PAYNE, Agent.”

This last telegram alludes to the endeavor of the compress company to procure local cotton to take the place of that delayed, but which they could not do, if at all possible, except at a cost much greater than the demurrage; and, if the ships had sailed without the cotton, the loss, “dead freight,” would have been \$4873.60, nearly three times as much as the demurrage.

After demand for indemnity for this demurrage which had been paid by the compress company for the detention of the steamers as aforesaid, and much negotiation to effect an equitable settlement of its claim, the said Air Line and its agent, Payne, failing to pay, this action was brought against all the associated companies and connections forming the Air Line, and, the whole matter of law and fact being referred to the court, a jury being waived, the court rendered judgment for the plaintiff against the appellant, which was the only one of the three railroad companies composing the Air Line on whom process had been served.

From this judgment the Norfolk & Western R. Co. appeals, and assigns error: “(1) That it ignores the true nature of the cotton business,” and that there was no contract between the compress company and Payne, as agent of the Air Line; and (2) that, if there was a contract, the compress company can recover no damages, as it received the delayed cotton after the times agreed on, and by so doing waived its claims for damages; and, besides these assignments of error in the petition for a writ of error, the counsel for appellant have urged, in their oral argument at bar, that the contract was *ultra vires* and void.

We have stated the facts of the case as presented by the record

at length, and in their due order, because we think that the mere statement of these facts shows plainly that the judgment of the corporation court of Norfolk is correct, and must be affirmed. They show all the elements of a contract expressly entered into between the Shippers' Compress Company, on the one hand, and the associated or connected railroad companies composing the Air Line, through Payne, their agent, on the other; the offer of the Shippers' Compress Company to Payne, their agent, as their agent to carry so many bales of cotton by certain chartered vessels from Norfolk to Liverpool, at a certain rate,—the offer stipulated the times, as a most important and essential condition of the engagement, when the cotton must be in Norfolk; and the acceptance of Payne as agent, of the said offer, to the extent of 5320 bales, unconditionally, and without qualification. There is no dispute as to the terms, or as to the offers and acceptances; and, if there were conflict in the evidence certified, that of the appellant conflicting would be disregarded by this court. The evidence shows that Payne, as agent of the railroad companies composing the Air Line, was expressly authorized to make, and had been in the constant habit of making, just such contracts for the carrying of cotton, even sometimes contracting for the whole capacity of ships for the purpose, and that he endeavored, as agent for the Air Line, to adjust and settle this claim. That he considered it a contract binding upon his principals is clearly shown by his repeated and urgent telegrams to his and the Air Line's interior agents at the time, in regard to the hurrying up and delivery of this cotton according to their engagement, and their responsibility for failure or delay.

The record shows, and it is not denied, that the appellant was a member of both the Virginia & Tennessee Air Line and its successor, the Virginia, Tennessee & Georgia Air Line. The offers made to Payne were distinctly addressed to him as "agent of the Virginia & Tennessee Air Line," made out on blank forms, gotten up and used by him in his business as such; and his acceptances were signed by him as such agent. All of the transactions of the compress company with him were as such agent, and he was appointed by Mr. Fink, the general manager of the Air Line, as their agent specially for this business,—the cotton business over this Air Line; and all persons dealt with him, and knew him, only as agent for the Air Line.

So far as the contracts sued on are concerned, the Shippers' Compress Company had nothing to do with the interior shippers of the cotton, did not know who they were, or anything about them, or where the cotton was to come from which Payne as agent for the Air Line, contracted to deliver at a fixed time, and then telegraphed to his interior agents to procure and send on for delivery. The owners or shippers of the

THE CONTRACT
CONSIDERED.

PAYNE 'WAS
AGENT FOR DEFENDANT.

OWNERS OF COTTON NOT CONCERNED.

cotton had nothing to do with the contracts, and never at any time, or in any way, agreed to deliver any of this cotton to the compress company, and are in no way liable to that company for the breach of a contract which they did not make, or authorize Payne to make for them.

Payne was the agent of the associated companies composing the Air Line, appointed by them expressly for the special business of making the contracts sued on, and judgment was, under Code 1873, c. 167, § 50, properly rendered against one defendant, the others not being served with process. The record shows that the appellee was careful, to an extraordinary degree, to lessen the damages which the appellant, by its breach of contract, had caused, and for which it was liable; while it had the right to permit the steamers to sail on the appointed days without the cotton, and hold the Air Line for \$4873.60 "dead freight," it yet, after endeavoring in vain to obtain local cotton to supply the derelict cotton, detained the steamship for a few days on demurrage, until the appellant could get the cotton and deliver it, and by so doing saved the appellant over \$3000. Allowing a party to complete a contract is no waiver of a right or claim to damages for loss incurred and actually paid, caused by his failure to complete it at the time agreed on. *Phillips & C. Const. Co. v. Seymour*, 91 U. S. 646, 651. Payne knew that his cotton was behind-hand, and that the steamers were on demurrage, waiting for it. He did not tell the compress company to send the ships off without it; but, on the contrary, telegraphed time and time again to his local interior agents, hurrying up the cotton, and telling them that he was notified that he must pay demurrage. On October 17th (three days before demurrage began), Myers, president, wrote to Payne, agent, that he would have to pay demurrage, and giving to him the amount per day for each vessel; and Payne showed by his conduct that he deemed it best, as greatly it was, for his principals to detain the vessels until the cotton could arrive and be delivered (as was done for a few days), and thereby lessen the damage which appellant by his breach of contract had become liable to pay.

As to the argument urged by the appellants that the contract made by Payne, agent for the delivery of this cotton, was *ultra vires*, we think the point is not well taken. The contract was incident to and for the benefit of their business as common carriers, and it was but a part of a long-established and systematic policy of these railroads composing the Air Lines to induce and control the transportation of cotton for the interior, west and southwest, over their line, for shipment to England from the port of Norfolk. It was not a contract to buy or sell cotton, but simply to deliver a certain number of bales of cotton, at a specified time, at Norfolk, for shipment to Liverpool

COMPRESS COMPANY DID NOT WAIVE RIGHT TO DAMAGES BY RECEIVING COTTON.

CONTRACT NOT ULTRA VIRES.

by chartered steamers for that purpose. It was not contrary to or forbidden by their charter, and it was for the interests of commerce, and in the line of their business.

"There is no question but that railroad corporations have, as auxiliary or incident to their main or authorized business, all the powers which an individual would have under the same circumstances; and the extent of these powers is to be determined, not only by reference to the express powers conferred by the charter, but also to the nature, extent, and necessities and conveniences of the business, and of the public." 1 Wood. Ry. Law, p. 474, § 170. "There is no question but that, under the head of its implied powers, a corporation, especially a railroad corporation, may, in order to increase its business, enter into many contracts and undertakings which are not strictly within its express powers, if they are not expressly prohibited, and are essential to promote the business of the corporations, or add materially to the convenience of its prosecution." Id. 479, 480. "It is hardly necessary to say that a railroad company has, by inference, power to enter into any and all species of contracts which are incident to the purposes for which it was created, and the business in which it is engaged, except in so far as this power is expressly or impliedly restricted by the terms of its charter, or the general law, the same as an individual might do, and is entitled to the same rights under, and is subject to the same liabilities upon, contracts as an individual would be." Id. p. 523, § 179; Pierce, R. R. 499-501. "May contract to haul certain quantity of freight per month." Wood. Ry. Law, p. 533, § 182. "May contract with connecting lines." Pierce, R. R. p. 508-510.

In the light of these authorities, and for the foregoing reasons, we are of opinion to affirm the judgment of the corporation court of Norfolk appealed from, with costs to the appellee.

Ultra Vires Contracts.—See generally, *Edwards v. Midland R. Co.*, 1 Am. & Eng. R. R. Cas. 571; *Boston & P. R. Co. v. N. Y. & N. E. R. Co.*, 2 Ib. 300; *Cleveland & M. R. Co. v. H. F. Co.*, 3 Ib. 471; *Davis v. Old Colony R. Co.*, 3 Ib. 543; *Taylor v. South., etc., R. Co.*, 6 Ib. 602; *Branch v. Jesup*, 9 Ib. 558; *Elkins v. C. & A. R. Co.*, 9 Ib. 590; *Marietta, etc., R. Co. v. Western Union Tel. Co.*, 10 Ib. 387; *Indianola v. Gulf, etc., R. Co.*, 11 Ib. 314; *London, etc., R. Co. v. Gomm*, 11 Ib. 385; *Yorkshire R. & W. Co. v. Marline*, 13 Ib. 658; *Green Bay, etc., R. Co. v. Union Steamboat Co.*, 13 Ib. 658; *Metropolitan El. R. Co. v. Manhattan R. Co.*, 15 Ib. 1; *Dupont v. Northern Pac. R. Co.*, 16 Ib. 456; *Dumpfelf v. Ohio, etc., R. Co.*, 16 Ib. 461; *Nashua, etc., R. Co. v. Boston, etc., R. Co.*, 16 Ib. 488; *Canada Southern R. Co. v. Lewis*, 20 Ib. 106; *Oregonian R. Co. v. Oregon R. & Nav. Co.*, 20 Ib. 523; *Nassau Bank v. Jones*, 20 Ib. 637; *Atchison, etc., R. Co. v. Fletcher*, 24 Ib. 34.

CENTRAL R. AND BANKING CO. OF GEORGIA

v.

LOGAN *et al.**(Advance Case, Georgia. January 25, 1887.)*

Section 719*q*. of the Georgia Code, it is provided that if any railroad company shall fail to deliver to a connecting road goods shipped to any point over or beyond such connecting road, the road failing to deliver shall be guilty of a conversion of the goods so shipped, and the owner or consignee may recover the value of the same, with interest, and not less than 10 nor more than 25 per cent for expenses and damages. Section 719*s*. provides that there shall be no discrimination by a railroad company in its rates or tariff of freights in favor of any line or route connected with it, as against any other line or route; nor upon a part of its own line, sought to be run in connection with any other route, shall such company discriminate against such connecting line, or in favor of the balance of its own line, but shall have the same rates for all, and shall afford the usual and like customary facilities for interchange of freight. To patrons of each and all routes and lines alike, any refusal of the same shall give a like right of action as mentioned in section 719*q*. A railroad company passed an order to the effect that, after that date, no shipment of salt or other merchandise from Brunswick, in competition with Savannah, would be received for local stations on its line, or for passing over another road operated by it under lease, or for points beyond, unless charges were prepaid and shipments were delivered at the company's warehouse by drays as local business, and that local rates from that point would be assessed. A firm shipped salt from Brunswick by a road connecting with the first-mentioned road; tendered it a large number of car-loads, which were refused, and the agent of the road bringing them inquired of the agent of the other road whether the above order was still in force and operative, and was informed that it was still in force. The shipper now brings suit to recover damages for such refusal. *Held:*

1. That there was no error in permitting the plaintiffs to testify that they had sustained loss in their business by being compelled to sell the salt on hand at greatly reduced prices by reason of the conduct of the defendant. Under the sections of the Code above quoted all the elements of real or actual damages which are admissible in other actions may be shown.

2. That there was no necessity to make the lessor of the road a party defendant to the action; and there was no error in refusing to dismiss the case because service was not perfected on the lessor company.

3. There was no error in charging that if the railroad company had not complied with the law in section 719*s*. of the Code, it was liable to the penalty prescribed in section 719*q*.

4. That the tender of the cars made to the refusing company was sufficient.

FROM Bibb.

Lyon & Gresham for plaintiff in error.

Hill & Harris and *Depau & Bartlett* contra.

BLANDFORD, J.—Logan & Co. brought their action against the Central R., and by their declaration alleged that they were dam-

aged by the defendant, in that it refused to receive and transport

FACTS. 47 car-loads of salt, which plaintiffs had shipped from Brunswick, Ga., to Macon, Ga., upon the cars belonging to the East Tennessee, Virginia & Georgia R., consigned to persons residing on the Southwestern R.; the said East Tennessee, Virginia & Georgia R. connecting with the Central R. at Macon, and having the same gauge; but that the salt was required to be unloaded and transported in drays to the warehouse of the Central R. in Macon, at great expense to plaintiffs; that the Central R. was operating the Southwestern R., and by an amendment it was further averred that the Central R. had leased the Southwestern R. There was a count that, by reason of defendant having failed to receive salt of plaintiffs, their business was broken up, and that thereby they sustained great damage. There was a general demurrer to the sufficiency of the declaration. The court below sustained the demurrer, and dismissed the action. On writ of error to this court, at the February term, 1885, the judgment sustaining the demurrer, and dismissing plaintiffs' action, was reversed, this court holding the declaration sufficient. See *Logan v. Central R. Co.*, 74 Ga. 684.

1. The plaintiffs were permitted to testify, over objection of defendant's counsel, that they had sustained loss in their business by being compelled to sell the salt which his company had on hand at greatly reduced prices, by reason of defendant's having refused to receive the cars of the East Tennessee, Virginia & Georgia R.,

and requiring transshipment at Macon by drays to defendant's warehouse. This is the first exception, and we will deal with it now. The act of 1874, is contained in sections 719*q* and 719*s* of the Code. The

WHAT EVIDENCE
ADMISSIBLE ON
QUESTION OF
DAMAGES.

first section provides that, if any railroad company shall fail to deliver to a connecting road goods shipped to any point over or beyond such connecting road, the road failing to deliver shall be guilty of a conversion of the goods so shipped, and the owner or consignee may recover the value of the same, with interest, and not less than 10 nor more than 25 per cent for expenses and damages. The last section provides that there shall be no discrimination by a railroad company in its rates or tariff of freights in favor of any line or route connected with it, as against any other line or route; nor upon a part of its own line, sought to be run in connection with any other route, shall such company discriminate against such connecting line, or in favor of the balance of its own line, but shall have the same rates for all, and shall afford the usual and like customary facilities for interchange of freights. To patrons of each and all routes or lines alike, any refusal of the same shall give a like right of action as mentioned in section 719*q* of this Code. Damages are presumed under this last section (719*s*), as in 719*q*, up to 10 per cent of the value of the property

which the railroad refuses to receive and transport when like facilities are afforded to other connecting roads, or to the patrons of other roads, or even of its own line; and beyond 10 per cent, and within the limit of 25 per cent, all the elements of real or actual damages which are admissible in any action are admissible in this action. The jury are required, when the railroad company has violated this statute, to find at least 10 per cent upon the value of the goods shipped, and may find 25 per cent, and any testimony which shows loss or damage to the plaintiff by reason of the misconduct or fault of the defendant is admissible in evidence to the jury which may influence their finding up to or within 25 per cent, and in this case the jury did not exceed the limit of 25 per cent; the value of the salt being shown to be from five to seven thousand dollars, the finding being \$900.

2. When the plaintiffs closed the introduction of evidence in the case, defendant moved to dismiss the case because it appeared that whatever damage had been done was by the Southwestern R. Co., and not by the Central R.; and that the Central R. was alone sued; there being no service on the Southwestern R., the lessor of the Central R., as required by law. This motion was overruled by the court, and this is excepted to, and error is assigned on said exception. This exception and ground of error was ruled adversely to the plaintiff in error in the case of *Central R. v. Whitehead*, 74 Ga. 441. It is alleged in the declaration, and proved on the trial of the case, that the Central R. was operating the Southwestern R., when the damage was done. This being so, there was no necessity to make the Southwestern R. Co. a party to the suit. Whether the Central R. Co. operated the Southwestern R., under a lease or otherwise, it was bound to comply with the law, and a failure on its part to discharge its legal duties rendered it liable to any one injured thereby.

NOT NECESSARY
TO MAKE LESSOR
PARTY TO SUIT.

3. The court charged the jury, and every point therein is excepted to by the plaintiff in error. The main ground relied on by plaintiff in error, is that there was error in the court's charge that, if the railroad company had not complied with the law as prescribed in section 719s of the Code, it was liable to the penalty prescribed in section 719q; the plaintiff in error insisting that the right of action against a railroad company for refusing to receive goods, and mulcting it in fixed damages for such failure, was not enacted until September 28, 1883, after this suit was brought, and that no damages could be recovered but the actual damages incurred by the plaintiffs for the transshipment of the salt which had been tendered. The decision complained of is in effect ruled in this case when it was formally before this court at the February term, 1885. *Logan v. Central R. Co.*, 74 Ga. 684. But, if it was not, we think that,

LIABILITY TO
PENALTY PRE-
SCRIBED IN SEC.
719 OF THE CODE.

construing sections 719*q* and 719*s* together, the provision in 719*s* that any refusal of the same—that is, like—facilities offered to one road connected with it, shall give a like right of action as that mentioned in 719*q*. The right of action given in 719*q* is to recover not less than 10 per cent nor more than 25 per cent for expenses and damages. These two sections give a right of action for the non-delivery of goods to a connecting road by a road intrusted with their carriage, which goods are consigned to a point or points beyond its limits or terminus, and a like right of action for refusal of a connecting road to receive the goods, and in discriminating in favor of one line and against another. These sections give the right of action to the plaintiffs in this case; so we hold that there is no error in the charge, as maintained in this case by the plaintiff in error.

4. The next assignment of error insisted on by counsel for plaintiff in error is that the court erred in instructing the jury that if the plaintiffs tendered to the defendant one or more car-loads of salt, and it was refused, and, when the 47 cars loaded with salt arrived, the agent of the railroad company bringing the salt to Macon inquired of the agent of the Central whether a certain order issued by the officers and agents of the Central R. Co. on the 12th October, 1882, to the effect that after that date no shipment of salt or other merchandise from Brunswick, in competition with Savannah, will be received for local stations on its line, or passing over the Southwestern R. Division, or points beyond, unless charges are prepaid, and shipments are delivered at the warehouse by drays, as local business, when local tariff rates from Macon will be assessed on same, was still of force and operative, and he was informed that said order was still of force, there then was no necessity for further tender of loss to defendant. We think that there was no error in this charge. The publication of the order by defendant, and the notification to the delivering company that the order was still of force, was a waiver of tender by defendant; and a party acting under such order will be equally protected as if he had made actual tender.

These are the main grounds in the assignment of error, and we need only say that there does not appear to be any error in the other assignments. Judgment affirmed.

Liability of Carrier for Refusing to Receive Freight.—See *Central & M. R. Co. v. Morris et al.*, 28 Am. & Eng. R. R. Cas. 50; *Houston, etc., R. Co. v. Smith*, 22 Ib. 421.

LITTLE ROCK AND FORT SMITH R. Co.

v.

HANNIFORD *et al.*

(Advance Case, Arkansas. June 25, 1887.)

The Arkansas act of February 27, 1887, provides that it shall be unlawful for any railroad company to charge and collect a greater sum for the transportation of goods than is specified in the bill of lading, and that if any railroad company shall refuse to deliver to the owner or consignee any goods upon the payment or tender of the freight charges due, as shown by the bill of lading, the company shall be liable in damages to an amount equal to the amount of the freight charges for every day the goods are held after payment or tender of the charges. *Held:*

1. That the act being general and uniform in its operation upon all persons coming within the class to which it applies, it does not come within that special legislation prohibited by the Arkansas constitution.

2. That the act is a mere police regulation for the purpose of preventing delay in the delivery of freight, and in no way interferes with or affects interstate commerce.

Where the weight of the goods carried is not specified in the bill of lading, it is the duty of the carrier to weigh the goods within a reasonable time after the receipt, and ascertain the amount of the charges, according to the rates specified in the bill of lading; and if it fail to do so, and refuse to deliver the goods, it will be subject to the penalty for delay imposed by the act.

APPEAL from circuit court, Conway county.

J. M. Moore for appellant.

Eugene B. Henry for appellees.

BATTLE, J.—On the 4th of January, 1886, plaintiffs, Hanniford, Beal & Wills, purchased of the Armour Packing Co., of Kansas City, Mo., 25,000 pounds of meat, and delivered it to the Southern Kansas R. Co. which executed its bill of lading therefor, and thereby contracted to ship and deliver it to plaintiffs at Morrillton, in this State, at the rate of 55 cents per 100 pounds. The defendant, Little Rock & Fort Smith R. Co., being one of the connecting line of carriers, received the meat at one end of its line, and carried it to Morrillton. The weight of the meat was not specified in the bill of lading. In the way-bill delivered to the defendant the weight specified was 33,900 pounds. Plaintiff tendered payment of the freight charges on 25,000 pounds, at the rate specified in the bill of lading, and the defendant demanded freight on 33,900 pounds, and for about four days refused to deliver unless freight on that amount was paid. After a delay and refusal to deliver for several days, plaintiffs brought an

action against the defendant for the meat, when defendant agreed to accept plaintiffs' offer. Plaintiffs then brought this action for damages to an amount equal to the freight charges tendered for every day defendant refused to deliver the meat after the tender of payment was made.

This action was brought under the act of the legislature approved February 27, 1885, which reads as follows:

PROVISIONS OF STATUTE. "Section 1. Be it enacted by the general assembly of the State of Arkansas, that it shall be unlawful for any railroad company in this State, its officers, agents, or employees, to charge and collect, or to endeavor to charge and collect, from the owner, agent, or consignee of any freight, goods, wares, or merchandise of any character or kind whatever, a greater sum for transporting said freight, goods, wares, or merchandise than is specified in the bill of lading.

"Sec. 2. That any railroad company, its officers, agents, or employees, having possession of any goods, wares, and merchandise of any kind or character whatever, shall deliver the same to the owner, his agent or consignee upon payment of the freight charges, as shown by the bill of lading.

"Sec. 3. That any railroad company, its officers, agents, or employees, that shall refuse to deliver to the owner, agent, or consignee any freight, goods, wares, and merchandise of any kind or character whatever, upon the payment, or tender of payment, of the freight charges due, as shown by the bill of lading, the said company shall be liable in damages to the owner of said freight, goods, wares, or merchandise, to an amount equal to the amount of the freight charges for every day said freight, goods, wares, or merchandise is held after payment, or tender of payment, of the charges due, as shown by the bill of lading, to be recovered in any court of competent jurisdiction."

This act being general and uniform in its operation upon all persons coming within the class to which it applies, it does not come within that special legislation prohibited by the constitution;

ACT NOT SPECIAL LEGISLATION. for it applies to and embraces all persons "who are or who may come into certain situations and circumstances," and is "general and uniform, not because it

operates upon every person in the State, for it does not, but because every person who is brought within the relations and circumstances provided for is affected by the law." *McAunich v. Mississippi & M. R. Co.*, 20 Iowa, 342; *Iowa R. Land Co. v. Soper*, 39 Iowa, 116; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 163; *Humes v. Missouri Pac. R. Co.*, 82 Mo. 221; *Davis v. State*, 3 Lea, 379; *Cooley*, Const. Lim. (5th ed.) 481. It is of that class of legislation specially enjoined by the constitution of the State upon the general assembly; for section 10, art. 17, Const., ordains: "The general assembly shall pass laws to correct abuses, and prevent discrimina-

tion and excessive charges, by railroad, canal, and turnpike companies for transporting freight and passengers, and shall provide for enforcing such laws by adequate penalties and forfeitures." Vested with the power to correct abuses by railroad companies, they had the right "to determine what, on the part of the railroad, constitute abuses, and to determine what laws will correct them, as well as what remedies may be necessary to secure the enforcement of such laws." In the exercise of this power and right, the act under consideration was, doubtless, passed. *Houston & T. C. R. Co. v. Harry*, 18 Am. & Eng. R. R. Cas. 502.

But it is contended that, if this act is applicable to this case, its effect is to regulate the charges to be collected on freight shipped from distant points in other States, and transported over several connecting lines of railroad to points within this State, and thereby affect interstate commerce, and is void. It is true the exclusive power to regulate commerce among the States is given by the constitution of the United States to Congress; but the vesting of this power in Congress was not a surrender of that which is known as the police power. That power still belongs to the State. The power to regulate commerce does not, in all cases, prevent the States, in the exercise of this power, from interfering with interstate commerce. In some cases it may be exercised to the extent of directly interfering with commerce between the States; as, for instance, a State may enact sanitary laws, and, for the purpose of self-protection, establish quarantine and reasonable inspection regulations, and prevent persons and animals having contagious or infectious diseases from entering the State. In many cases a State, through her legislature, in the exercise of the police power, may enact laws which merely affect or influence, but do not regulate or control, interstate commerce. As an illustration, she may, within her boundaries, require trains to stop at railroad crossings, at draw-bridges, and require the speed of trains to be reduced when running through incorporated towns and cities, may regulate the speed of railroad trains, and may require railroad companies to place guards at bridges and other points of danger, notwithstanding the railroad affected may run through more than one State, or connect with railroads operated in other States, and may be engaged in transporting freight from one State to another. *Railroad Co. v. Husen*, 95 U. S. 465; *Chicago & A. R. Co. v. Pierson*, 12 Am. & Eng. R. R. Cas. 156.

In *Munn v. Illinois*, 94 U. S. 113, the State of Illinois undertook, by statute, to regulate warehouses in that State. The court held she could do so, in the exercise of her police power, notwithstanding they were used as instruments by those engaged in interstate as well as in state commerce. The court said: "We come now to consider the effect upon this statute of the power of Congress to regulate commerce. It was very properly said in case of

DOES	NOT	AF-
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70 LITTLE ROCK AND FORT SMITH R. CO. v. HANNIFORD.

State Tax on Railway Gross Receipts, 15 Wall. 293, that 'it is not everything that affects commerce that amounts to a regulation of it within the meaning of the constitution.' The warehouses of these plaintiffs in error are situated, and their business carried on exclusively, within the limits of the State of Illinois. They are used as instruments by those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally, they may become connected with interstate commerce, but not necessarily so."

In Railroad Co. v. Fuller, 17 Wall. 567, Mr. Justice Swayne, in delivering the opinion of the court, said: "The constitution gives to Congress the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. The statute complained of provides that each railroad company shall, in the month of September, annually, fix its rates for the transportation of passengers and of freight of different kinds; that it shall cause a printed copy of such rates to be put up at all its stations and depots, and cause a copy to remain posted during the year; that a failure to fulfil these requirements, or the charging a higher rate than is posted, shall subject the offending company to the payment of the penalty prescribed. In all other respects there is no other interference. No other constraint is imposed. Except in these particulars, the company may exercise all its faculties as it shall deem proper. No discrimination is made between local and interstate freights, and no attempt is made to control the rates that may be charged. It is only required that the rates shall be fixed, made public, and honestly adhered to. In this there is nothing unreasonable or onerous. The public welfare is promoted without wrong or injury to the company. The statute is doubtless deemed to be called for by the interests of the community to be affected by it, and it rests upon a solid foundation of reason and justice. It is not, in the sense of the constitution, in anywise a regulation of commerce. It is a police regulation and as such forms 'a portion of the immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government, all which can be most advantageously exercised by the States themselves.'"

The act in question does not undertake to regulate commerce between States. It imposes no restriction upon the introduction or the transportation of any article of commerce whatever. It does not undertake to regulate the charges for transportation, but simply undertakes to enforce the prompt delivery of all freight, goods, wares, and merchandise of every character, upon arrival at its place of destination in this State, and nowhere else, upon the payment, or tender of payment, of the freight charges due, as shown by the bill of lading. It does not go to the extent of the statute

considered in *R. Co. v. Fuller, supra*. In that case the statute subjected the railroad company to a penalty for the charging of a higher rate than was posted. We cannot see how it can interfere with or affect interstate commerce, and think it is constitutional and valid.

It is contended that appellant is not liable in damages, under the act, because the bill of lading fails to give the weight of the meat. The object of the act is to compel railroad companies to deliver freight, after arrival, upon payment, or tender of payment, of charges. Because the weight of the meat was not stated in the bill of lading, the appellant was not relieved of the duty to deliver promptly, upon payment, or tender of payment, of the freight charges. It was its duty to have weighed the meat without unreasonable delay. That was the only way in which the amount of the freight could have been ascertained. The sum to be paid for transportation was sufficiently specified in the bill of lading to enable all parties to ascertain what the freight charges were. This is the only object of the act in requiring the amount to be paid to be specified in the bill of lading. The sum to be paid was therefore sufficiently specified in the bill of lading to accomplish the object of the act in that respect, and to render appellant liable in damages for failure to deliver upon the payment, or tender of payment, of the amount due for transportation.

DUTY TO WEIGH
MEAT AND ASCER-
TAIN CHARGES.

We find no error in the instructions of the trial court prejudicial to appellant. All questions of fact were fairly submitted to the jury. There was evidence to sustain the verdict. Judgment affirmed.

Proper Police Regulations are Not Regulations of Interstate Commerce.—See *Stone v. New Orleans, etc.*, R. Co. 23 Am. & Eng. R. R. Cas. 606; *Chicago, etc., R. Co. v. Pierson*, 12 Am. & Eng. R. R. Cas. 156; *Chicago etc., R. Co. v. People*, 13 Ib. 42; *State v. Baltimore, etc., R. Co.*, 18 Ib. 466; *Fargo v. Auditor Genl.*, 22 Ib. 216.

Ex parte KOEHLER, Receiver, etc.

(Circuit Court, D. Oregon. April 4, 1887.)

The transportation of property from one State to another is interstate commerce, whether the carriers engaged in moving it, or the vehicles on which it is borne, cross the line of the State or not.

The Interstate Commerce Act does not include or apply to all carriers engaged in interstate commerce, but only such as use a railway, or a railway and water-craft, "under common control, management, or arrangement for a continuous carriage or shipment" of property from one State to another; nor

does it apply to the carriage of property by rail wholly within the State, although shipped from or destined to a place without the State, so that such place is not in a foreign country.

The Oregon Railway and Navigation Co. carries certain kinds of goods on its steamers forth and back between Portland and San Francisco at special and reduced rates. The Oregon & California Railway, under the management of the petitioner, carries the same kinds of goods forth and back between Portland and Ashland, and way-stations in Oregon, at special and reduced rates. The Oregon Pacific R. Co. carries the same kind of goods forth and back between certain points on the line of the Oregon & California road and San Francisco via its railway from Albany to Yaquina bay, and thence by steamer, at reduced rates, and thereby competes with the Oregon & California Railway and the Oregon Railway & Navigation Co. for business between said points and San Francisco. The Oregon Railway & Navigation Co. and the receiver of the Oregon & California Railway act independently, though concurrently, in making these reduced rates, but no through bill of lading or freight receipt is given, nor is either interested in or liable for the carriage of the goods beyond its own line of transportation. *Held*, that the Oregon & California road and the steamers of the Oregon Railway & Navigation Co. in the carriage of the goods in question are not "used under common control, management, or arrangement for a continuous carriage or shipment" thereof to and from San Francisco, within the intent and meaning of the act, and that the carriage and handling of said goods, so far as the receiver is concerned, is performed wholly within the State, and therefore specially exempted by the terms of the act from its operation, provided the same are not directly shipped to or from a foreign country.

PETITION for instruction under the Interstate Commerce Act.
John W. Whalley for petitioner.

DEADY, J.—The road of the Oregon & California R. Co. is 400 miles in length, and lies wholly within this State, between Portland and Ashland, near the southern boundary thereof. It is operated at present by a receiver of this court heretofore appointed on the application of the plaintiff, in the pending suit of *Harrison v. Oregon & C. R. Co.*, to enforce the lien of a mortgage thereon. On March 30, 1887, the receiver, Mr. Richard Koehler, filed a petition in this court, asking for instruction whether the Oregon and California road is within the purview of the Interstate Commerce Act lately passed by Congress, when engaged in carrying freight destined to or coming from a point or place without the State, under the circumstances herein stated.

It appears from the petition that the receiver, acting under the instruction of this court heretofore given (*Ex parte* Koehler, 25 Fed. Rep. 73), has been and now is carrying wheat and other agricultural products of the State, destined to San Francisco, from certain points along the line of the Oregon & California road where there is competition with the Oregon Pacific R. Co., at special and lower rates than if destined for Portland only; that such products are taken from Portland to San Francisco, at a special rate, on the steamers of the Oregon Railway & Navigation Co.;

QUESTION
STATED.

FACTS.

that said steamers also carry goods at special rates on their return trips from San Francisco to Portland, destined to the points aforesaid along the line of the Oregon & California road, consisting of the products of California, China, and Hawaiian Islands, and the Central and South American states, which goods are carried from Portland, on the Oregon & California road, to the places of their destination at special and lower rates than those charged for goods shipped from Portland for other and non-competing points on said road; that the Oregon Pacific R. Co. is operating a line of railway from Albany to Yaquina bay, Oregon, in conjunction with a line of steamers between the latter place and San Francisco, and is avowedly carrying and offering to carry freight to and from San Francisco, and portions of the country traversed by the road of the Oregon & California Co., at cost, and that, unless the receiver is allowed to make a special rate for freight between the points on the Oregon & California road subject to this competition and San Francisco, said road will not be able to retain its share of this business; and that, although the Oregon Railway & Navigation Co. and the receiver of the Oregon & California road, in making special rates as aforesaid, purpose to obtain, each for itself, the carriage of goods which otherwise they might lose, yet there is no agreement or guaranty between them on the subject, nor is such freight ever shipped on a through bill of lading, or the one party in any way liable for the default or miscarriage of the other in respect thereto, but each for itself carries the same over its own route,—it being represented to and understood by the shippers that, if they send such goods by these lines of transportation, they will be carried over each at a certain reduced rate; and that the Oregon & California road and the Oregon Railway & Navigation steamers “are not under any ‘common control, management, or arrangement for a continuous carriage or shipment,’ in any manner,” unless the facts herein stated make them so, and on this point the receiver prays the advice and direction of the court.

The first section of the act reads as follows:

“That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property *wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment*, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States, through a foreign country, to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country, and carried from such place to a port

PROVISIONS OF
INTERSTATE ACT.

of transshipment, or shipped from a foreign country to any place in the United States, and carried to such place from a port of entry either in the United States or an adjacent foreign country: provided, however, that *the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.* The term 'railroad,' as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

There is no doubt this railway and these steamers are engaged in interstate commerce in the carriage of these goods under the circumstances stated. Any carriage of goods which crosses a State line is interstate commerce; and the fact that transportation from one State to another is accomplished in whole or in part through the agency of independent and unrelated carriers up to and from the State line, does not affect the character of the transaction in this respect. For, whenever an article destined to a place without the State is shipped or started therefor, it becomes the subject of interstate commerce, and the carriers employed in the transportation thereof, although neither of them may pass from one State to the other, are subject, as instruments of such commerce, to national legislation and control. *The Daniel Ball*, 10 Wall. 564; *Hall v. De Cuir*, 95 U. S. 485; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 572; s.c., 26 Am. & Eng. R. R. Cas. 1; *Ex parte Koehler*, 25 Fed. Rep. 76; s.c., 21 Am. & Eng. R. R. Cas. 52.

But the Interstate Commerce Act does not include or apply to all the instrumentalities or agencies used or engaged in interstate commerce. It does not include any watercraft unless it is used in connection with a railway, "under a common control, management, or arrangement, for a continuous carriage or shipment" from one State or Territory of the United States to another, or to or from such State or Territory from or to a foreign country. Nor does it include the carriage or handling of property, by rail or otherwise, when such carriage and handling is performed wholly within a State, unless the same is directly shipped to or from a foreign country from or to such State.

SAME—WHO ARE
SUBJECT TO PRO-
VISIONS.

SAME—CONNEC-
TION WITH WA-
TER CARRIERS.

The mere fact that a railway wholly within a State and a vessel running between said State and another meet at a point within the railway State, and thus form a continuous line of transportation between the two States, by the one taking up the goods delivered by the other at its terminus, and carrying them thence to their destination, does not bring the carriers who so use the railway and steamer within the act. So long as the railway and steamer are each operated under a separate and distinct control, making its own rates, and only liable for the carriage and safe delivery of the goods at the end of its own route, the act does not apply to the transaction. To make these carriers subject to the act, the railway and vessel must, as therein provided, be operated or used under a "common control,"—a control to which each is alike subject, and by which rates are prescribed and bills of lading given for the carriage of goods over both routes as one.

On this apparently plain exposition of the act, the railway of the Oregon & California Co. and the steamers of the Oregon Railway & Navigation Co. are not "used under a common control, management, or arrangement" in this respect, and therefore are not subject to the act, although engaged in interstate commerce. Each carrier makes its own rate, and undertakes for the carriage and delivery of goods not otherwise than over its own route. The fact that both are interested in maintaining the traffic between Oregon and California over this route and by this means, so as to secure it against the competition of the Oregon Pacific, is not material. Each is at liberty, as far as the other is concerned, to raise or further reduce its rates to-morrow if the exigencies of the traffic permit or require it. The present rate is not the result of any "arrangement" between the two carriers "for a continuous carriage or shipment" from Oregon to San Francisco, and *vice versa*, but only an independent, though concurrent, reduction of rates by each over its own route, for the purpose of retaining the traffic thereon against the competition of a rival route.

OREGON & CALI-
FORNIA CO. NOT
SUBJECT TO THE
ACT.

The questions involved in this inquiry arise on the first section of the act. Taking its several clauses together, my impression is that no carrier is within its operation unless he is engaged in interstate commerce by means of a railway or railway and water-craft under one "control, management, or arrangement," and that by such means or instrumentalities he does actually and continuously carry goods from within to without the State, or from without to within the same. He may form a link in a line of interstate commerce; but, if his relation to such commerce or interest in or liability for the carriage thereof does not extend beyond the line of the State, he is not within the act.

The receiver is therefore instructed that he is at liberty, so far as the act is concerned, to make special rates for the carriage of

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goods from or to points on the line of his road for the purpose of obtaining or retaining business therefor against other carriers competing for the same. But this direction does not apply to goods shipped directly to or from a foreign country over the line of the Oregon & California road.

What is Interstate Commerce.—See *Wabash, etc., R. Co. v. People*, 26 Am. & Eng. R. R. Cas. 1; *Ex parte Koehler*, 21 Ib. 52; *Ex parte Richard Koehler*, 29 Ib. 44.

ROTHSCHILD

v.

WABASH, ST. LOUIS AND PACIFIC R. CO.

(*Advance Case, Missouri. May 16, 1887.*)

The plaintiff brought an action against the defendant, a railroad company, to recover back freight paid in excess of that charged to other shippers. The evidence showed that the favored parties were extensive shippers of cattle over the same route as that used by plaintiff, and that they made an arrangement at the end of the route, the point of destination, with three trunk lines, to even up the live-stock tonnage between these lines, the "eveners" being required to make special purchases and shipments when necessary to maintain the agreed division of business, whether the market justified it or not; they to receive commissions on all the stock shipped by them, or other persons, over these roads. This contract was in operation when plaintiff shipped his stock. *Held*, that in the absence of any evidence that defendants were parties to the arrangement with the "eveners," plaintiff cannot recover.

APPEAL from St. Louis court of appeals.

Patrick & Henry and *C. H. Krum* for appellant.

W. H. Blodgett for respondent.

BLACK, J.—This suit was commenced against both the Wabash R. Co. and the Wabash, St. Louis & Pacific Co., but dismissed as to the former. The petition, in substance, states that the defendant is a common carrier; that between August 1, 1877, and January, 1878, the plaintiff shipped by the defendant's road, from East St. Louis to Jersey City, 247 car-loads of cattle, and was required to pay the defendant therefor \$130 per car; that Nelson Morris, Samuel W. Allerton, and Timothy Eastman were, at the same time, shippers of cattle over the defendant's road from the same point to the same point; that, by virtue of a secret arrangement, the defendant agreed with these three persons to and did ship their cattle at a much cheaper rate; that the amount to be paid by them was dependent upon an accounting; and that they

only paid \$60 per car-load ; and, because of the unjust discrimination, plaintiff asks judgment for \$16,800.

On the trial it was stipulated that prior to 1879 the St. Louis, Kansas City & Northern R. Co. was a corporation under the laws of this State, owning and operating a railroad from Kansas City to St. Louis, in this State ; that from January, 1877, to November, 1879, the Wabash R. Co. was a corporation organized under the laws of the States of Illinois, Indiana, and Ohio, and as such owned and operated a railroad from East St. Louis, in the State of Illinois, through said States, to Toledo, in the State of Ohio ; that on the 10th November, 1879, these two corporations were consolidated under the name of the Wabash, St. Louis & Pacific R. Co., the present defendant. It is alleged in the defendant's answer, and for all the purposes of this case stands admitted, that plaintiff brought a suit against the Toledo, Wabash & Western R. Co. for damages on the same cause of action stated in this case, and in which suit he had a verdict and judgment for \$14,820, which remains unpaid.

This case was tried by the court without a jury. After the evidence was all in, the court, at the request of the plaintiff, gave an instruction, but found the issues for the defendant. That instruction, which was the only one asked or given, is as follows: "The court declares the law to be that a railroad company is bound to receive and carry without discrimination in its charges for the same service, and that, if the evidence shows that defendant (or the Wabash, which is the predecessor of the defendant) charged plaintiff more for carrying his cattle from East St. Louis to Jersey City than he charged S. W. Allerton, Nelson Morris, or T. C. Eastman for a similar service, then plaintiff is entitled to recover the excess or overcharge so paid by him." It will be seen the court declared the law as asked by the plaintiff on the trial, and as he contends for in this court, but found the facts against him. It is this finding of the facts only that is now here for review. We cannot interfere with the trial court in its finding of the facts in these actions at law unless the finding is against the undisputed evidence. It is scarcely necessary to say that this court cannot pass upon the weight of the evidence in action at law. This is a matter for the trial judge or jury, as the case may be tried.

INSTRUCTION AS
TO RECOVERY OF
BACK CHARGES.
—REVIEW OF
FINDING OF
FACTS.

The evidence shows that Eastman, Morris, and Allerton were extensive shippers of cattle from East St. Louis and Chicago to New York. In 1875, they made an arrangement, at New York City, with the three trunk lines, to wit, the New York Central, the Pennsylvania Central, and the Erie, to even up the live-stock tonnage between these lines. The Erie was to have 25 per cent, and each of the other roads 37½ per cent. These persons were required to make special purchases and shipments when necessary to maintain the agreed division of business, whether the market justified

it or not. On the other hand, the "eveners," as they are called, were to and did receive a compensation or commission on all stock shipped by them and other persons over these roads, ranging from ten to twenty dollars per car-load. It is said one purpose of the arrangement was to maintain uniform rates for the shipment of cattle to New York. The "eveners' contract" was in operation when the plaintiff shipped the 247 car-loads. The plaintiff, it will be remembered, first recovered a judgment against the Toledo, Wabash & Western R. Co. In this case, in a very brief way, he says he shipped the cattle by the "Wabash Railway." In the same connection he speaks of Mr. McBeth as the stock agent of the "Wabash & Western road," with whom he used to make rates. The freight-bills were in evidence, but they are not in this record. It is impossible to say from this record whether the cattle were shipped from East St. Louis by the Wabash R. Co., or by the Toledo, Wabash & Western R. Co. It may be they are different names of the same corporation, but it does not so appear from anything in this record, and until it does appear we must assume that they were different corporations.

Again, there is some evidence tending to show that the Toledo, Wabash & Western R. Co., as a connecting line to one of the trunk roads, came in and agreed to share in paying the compensation to the "eveners," but it is very indefinite; and there is little or no evidence to show that the Wabash R. Co. was a party to that agreement. Under the meagre evidence the court might well have found that the plaintiff did not ship his cattle over the last-named road; and, if he did, that the evidence was insufficient to show that that corporation was a party to the "eveners' " arrangement with the three trunk lines. If the Wabash R. Co. is not shown to be liable in this case, then of course the present defendant, its successor, cannot be made liable.

Important questions of law are discussed in the briefs on the one side and the other, but we have been unable to see that they are properly before us for consideration. The respondent contends also for the conclusive effect of the finding of facts made by the court.

For the reasons before stated, the judgment of the court of appeals, affirming the judgment of the circuit court, is affirmed.
All concur.

Discrimination Resting on Amount of Freight supplied Illegal.—A contract by which a railroad company agrees to charge a rate of not less than \$2.40 per ton to all persons shipping less than 100,000 tons of coal per annum over its road, and to make a rate of \$1.60 per ton to all shippers shipping 100,000 tons or over, is void; the discrimination being so gross as to be contrary to public policy. *Burlington, etc., R. Co. v. Northwestern Fuel Co.*, 31 Fed. Rep. 552

Recovery back by Shipper of Over-charges.—See *National Tube Works v.*

Balt. & Ohio R. Co., 28 Am. & Eng. R. R. Cas. 13; Waterman v. Chicago, etc. R. Co., 18 Ib. 486; Peters, etc., R. Co. v. Marietta, etc., R. Co., and note, 18 Ib. 492; West Va. T. Co. v. Sweetzer, 22 Ib. 469; Murray v. Gulf, Colo., etc., R. Co., 22 Ib. 464; Scott v. Erie, etc., R. Co., 10 Ib. 51; Stever v. Ill. Cent. R. Co., 16 Ib. 53; Killmer v. New York, etc. R. Co., 23 Ib. 659; Burkholder v. Union T. Co., 23 Ib. 656; Glasgow, etc., R. Co. v. McKinnon, 27 Ib. 1.

SAMUELS *et al.*

v.

LOUISVILLE AND NASHVILLE R. Co.

(*Advance Case, U. S. Circuit Court, N. D. Alabama, 1887.*)

The plaintiffs were engaged as common carriers by means of steamboats between Decatur and Bridgeport on the Tennessee river. A rival line of boats plied between the same points. Both lines bore the same relation to the defendant railroad company, each seeking its service to carry their freight to the same points of destination. In the matter of freights delivered to them by the two lines, the railroad company charged and received from the plaintiffs fifty cents more per hundred than it charged and received from the rival line. For this systematic discrimination plaintiff seeks to recover damages. *Held:*

1. That they were entitled to recover.
2. That the fact that the rate charged the plaintiffs was not unreasonable does not affect the fact of discrimination.
3. That the relative situations of the two rival lines of boats on the river being the same as to the defendant company, both as to the kind of service and the conditions under which it is to be performed, no charge is reasonable for one party that is not also reasonable for the other; and plaintiffs' suit cannot be regarded as a claim for damages founded upon the refusal of the company to prorate with one line, upon through freights, upon the same terms that it does with the other.

AT LAW. On demurrer to complaint.

L. W. Day for plaintiffs.

R. A. McClellan and *C. C. Harris* for defendant.

BRUCE, J.—The plaintiffs alleged they were engaged as common carriers for hire by means of steamboats on the Tennessee river, between Decatur and intermediate points, to Bridgeport, in the year 1886; that at the same time, and between the same points on the Tennessee river, the steamboats Chattanooga and Wilder were also running on the river between the same points, as carriers, in competition with the plaintiffs; that the defendant, the Louisville and Nashville R. Co., a common carrier by rail, operating its roads south from Louisville, Kentucky, to points on the Tennessee river, discriminated against plaintiffs in the matter of freights delivered to them by plaintiffs for trans-FACTS.

portation to points of destination, and in favor of the steamboats Chattanooga and Wilder; that the discrimination consisted in this: that, for substantially the same service in the carriage of the same class of freight, under like circumstances and conditions, and to the same points of destination, the defendant railroad company charged and received from plaintiffs fifty cents more per hundred than it charged and received from the steamboats Chattanooga and Wilder. Plaintiffs say that, by reason of such discrimination and charges for freight against them, they were injured in their business as common carriers on the river, and were put to expense, trouble, and increased risk in carrying their freight long distances on the river, to obtain carriage for it to points of destination, for which alleged injury to them they bring this complaint and suit for damages. The demurrer admits the discrimination in the rates, as stated; and the question at once suggests itself whether a common carrier, under the circumstance stated, has the right to have and maintain two prices, or different prices to different parties, for substantially the same service rendered under like conditions.

The question here is not whether a common carrier must necessarily have one and the same price for all, or whether a discrimination in a single case can be made the ground of an action; but THE QUESTION AT ISSUE. here were two lines of steamboats on the Tennessee river, plying between the same points, carrying freight for hire, and bearing the same relation to the defendant railroad company, both seeking its service to carry their freight to the same points of destination; and the question is, has the defendant the right to discriminate against one, and in favor of the other, not in a single or isolated case, when different circumstances and conditions might be at once suggested, but systematically, in a course of dealing with the plaintiffs in the transportation of their freight?

The idea that lies at the very base of the law of common carriers is that they are public servants, and serve all alike. The general proposition needs no citation of authority, and, as CARRIERS MUST SERVE ALL ALIKE. applied to railroad companies, the doctrine is thus stated by McCrary, J., in the case of *Southern Exp. Co. v. Memphis R.*, 13 Cent. Law J. 68, 8 Fed. Rep. 802; 2 Am. & Eng. R. R. Cas. 639.

“(1) A railroad company is a *quasi* public corporation, and bound by the law regulating the powers and duties of common carriers of persons and property; (2) it is the duty of such a company, as a public servant, to receive and carry goods for all persons alike, without injurious discrimination as to rates or terms.”

Other cases might be cited to the same purport. In *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 311; s. c., 6 Am. & Eng. R. R. Cas. 594, Baxter, J., says:

“The defendant is a common carrier by rail. Its road, although owned by a corporation, was nevertheless constructed for public uses, and is, in a qualified sense, a public highway. Hence everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities which it is capable of affording. Its ownership by the corporation is in trust, as well for the public as for the shareholders; but its first and primary obligation is to the public.”

In the light of these authorities, where can this defendant railroad company and public servant base its right to make the discrimination claimed by this demurrer? If a discrimination of 50 cents per hundred can be thus made and sustained, under such circumstances, then any discrimination, however great and oppressive, can be made; and practically the defendant can say who may and who may not serve the public as common carriers on the Tennessee river, one of the great water-ways of commerce in the United States.

It is true there is a line of decisions to the effect that railroad companies may make different rates to different persons; and the cases show upon what grounds discrimination in rates may be and are sustained, and upon what grounds they have been held to be vicious, and are condemned, by the courts. But it is not necessary here to go into any examination of the cases on this line of decision until advised by plea or otherwise upon what ground, and under what circumstances and conditions, the defendant made the discrimination here complained of. He admits the fact of discrimination; and when the service is stated to have been substantially the same, and rendered under substantially the same circumstances and conditions, the burden is on him to justify it.

The demurrer, however, goes to the point that the mere fact that the defendant charged a higher price to the plaintiffs than to the line of rival steamboats is no ground of complaint, unless it is alleged that the price charged the plaintiffs was unreasonable. In other words, the proposition seems to be that the defendant had the right to make the discrimination up to the point that the charge became unreasonable, and that charging a less price to the rival line of boats is no ground of complaint, unless the larger price is an unreasonable one. It is said that to charge one too little for a service is not to charge another too much for the same service; that the smaller charge does not make the greater charge more than the service is really worth, for that the service may have been worth every penny asked and received for it. Concede that, then it follows that the defendant company was serving the steamboats Wilder and Chattanooga for a less hire and compensation than the service was really worth; and the practical result to these plaintiffs, as carriers on the river, is the same, whether the defendant

NOT NECESSARY
THAT HIGHER
RATES SHOULD
BE UNREASON-
ABLE.

charged them 50 cents per hundred too much, or charged their rivals 50 cents per hundred too little. In either case, the defendant railroad company makes the discrimination, and the plaintiffs lose and are deprived by the defendant of their equal right and opportunity for business as common carriers on the river. And the question recurs, what right, or upon what ground, can this public servant, owing an equal duty to the entire public, say to one, "I will serve you for less than I will serve your neighbor?" The proposition insisted upon is that a common carrier is bound to carry for a reasonable remuneration, but is not bound to carry for the same price for all; and the case of *Johnson v. Pensacola R. Co.*, 16 Fla. 623, is cited, where the supreme court of that State say: "The rule is not that all shall be charged equally, but reasonably, because the law is for the reasonable charge, and not the equal charge," and other authorities are cited on the same line.

It would add nothing to the complaint, in its statement of fact, if the word "unreasonable" had been used. The word "unlawful" is used; but the use of qualifying words such as these is unimportant. The ultimate test of what is a reasonable or unreasonable charge, a lawful or unlawful charge, in a given case, is a mixed question of law and fact, to be reached by the verdict of a jury, under proper instructions by the court, or, perhaps, by the action of what is called sometimes a railroad commission, under statutes, state or national, on that subject.

This is not a case for the recovery of extortionate and unreasonable charges, exacted by the defendant railroad company, where the question as to what is a fair and just charge for a given service might properly arise, and be determined by some accepted rate of charges, or some usage or custom which has acquired the force of law. Nor is it the question as to what is the intrinsic value of the service, in the ascertainment of which there are many elements to be considered, such as the amount of the capital employed, and the difficulty and expense attendant upon the service rendered, including compensation for services of officers having the administrative capacity required for such service. But, so to speak, on this side of that ultimate question is the question of the legal right of the defendant to make the discrimination here complained of.

When it is said that to charge one too little is not to charge another too much for a given service, we are ready to give assent. Because individuals may serve for hire, or may, without compensation, donate their services, it does not follow that common carriers by rail may do the same thing. The company owns the property, and the capital employed in the construction and operation of its road, but it must not be forgotten that in such operation of its railroad it is also in the enjoyment of a public franchise; and in the control of the property it has not the same measure of power that persons have and exercise over property that is affected by no

public use, and operated without the exercise of any public franchise. *Munn v. Illinois*, 94 U. S. 113.

There may be, and there is, difficulty in the determination, in given cases, of the line of public and private right, as to this species of property, as is illustrated in the enactment and administration of the recent act of Congress known as the "Interstate Commerce Law." But the question in this case is to be determined upon the principles of the common law, and in the light of those principles as applied to railroad companies. In a case like the one at bar, can there be a reasonable charge which is not at the same time substantially an equal charge? And is not a charge unreasonable when it is unequal, and in breach of the obligation and duty of the common carrier to the public?

There is a suggestion in the argument that this is a claim for damages founded upon the refusal of the defendant railroad company to prorate with the plaintiffs, upon through freight, upon the same terms that it did with the rival line of boats; and the case of *Atchison, T. & S. F. R. Co. v. Denver R.*, 110 U. S. 667; s. c., 16 Am. & Eng. R. R. Cas. 57, is cited upon this point, and in support of the general proposition insisted upon by the defendant in his demurrer to this complaint. That is not the case made by the complaint, and the supreme court of the United States, in the opinion of that case, in so far as it touches the issues involved in this case, is against the views of the demurrant, as is seen from page 684 of the opinion, where the court say:

PLAINTIFFS'
SUIT NOT BASED
ON A REFUSAL TO
"PRORATE."

"The bill does not seek to reduce the local rates, but only to get this company put into the same position as the Denver & Rio Grande, on a division of through rates. This cannot be done until it is shown that the relative situations of the two companies with the Atchison, Topeka & Santa Fe, both as to the kind of service and as to the conditions under which it is to be performed, are substantially the same, so that what is reasonable for one must be reasonable for the other."

Applying this to the case at bar, the implication is certainly very strong that the relative situation of the two rival lines of boats on the river being the same as to the defendant company, both as to the kind of service and the conditions under which it is to be performed, no charge is reasonable for one party that is not also reasonable for the other; and the idea of different prices to different parties, for substantially the same service, performed under like conditions, finds no favor in the authority cited.

Another proposition of the defendant is that there is a charter provision, to the benefit of which the defendant is entitled, by which the legislature granted the power to take "tolls from all persons, property, merchandise, and other commodities, transported on their road, pro-

DEFENDANTS
NOT PROTECTED
BY CHARTER
PROVISIONS.

vided only the net profits of the road shall never exceed twenty-five per cent per annum." And within this limitation, which it is said has never been passed, the company was vested with absolute discretion, bounded only by the common law, over the rates of compensation it should have for services rendered. This proposition answers itself, because it admits the bound and limit of the common law; and we have shown that the gravamen of this action is in the alleged violation by this defendant of the obligation and duty under the common law, as applied to common carriers by rail.

The suggestion of a charter right which gives the defendant an option to discriminate at will, provided only the net profits of the road do not exceed a certain limit, scarcely merits serious consideration.

Upon the question of the remote, indefinite, and speculative character of the damages claimed, the complaint is within the rule on that subject. As to the loss of business, it may be that the proof may show that it is incapable of measure by a pecuniary standard; but the reading of the complaint shows that an objection to the whole complaint, on the ground stated, ought not to be maintained.

The result of these views is that the demurrer is overruled.

Discrimination against Connecting Lines.—See *Missouri Pac. R. Co. v. Texas & Pac. R. Co.*, 28 Am. & Eng. R. R. Cas. 1.

Carrier may Prorate Through Freight with One Line and not with Another.—*Mo. Pac. R. Co. v. Texas & Pac. R. Co.*, 28 Am. & Eng. R. R. Cas. 1.

HULL, BARNSELY AND WEST RIDING JUNCTION R. AND DOCK CO
v.

YORKSHIRE AND DERBYSHIRE COAL AND IRON CO.

(*Law Reports*, 182 Q. B. D. 761.)

Sect. 90 of the Railways Clauses Consolidation Act, 1845,—which provides that all tolls charged by a railway company shall be at all times charged equally to all persons, and after the same rate, in respect of all goods of the same description, passing over the same portion of the line of railway under the same circumstances, and that no reduction or advance in any such tolls shall be made directly or indirectly in favor of or against any particular company or person travelling upon or using the railway,—does not prevent the company from making a special charge for goods carried over their railway, in pursuance of a traffic agreement with another company under s. 87 of the Act.

APPEAL by the defendants against the judgment of Wills, J., at

the trial of the action, without a jury, at the Leeds Spring Assizes, 1886.

The action was brought to recover tolls claimed to be due from the defendants to the plaintiff company in respect of the carriage of coal over the line of the plaintiff company from the defendants' Carlton Main Colliery, situate near Cudworth, which was connected by a siding with the plaintiffs' line, to Hull.

By their statement of defence the defendants alleged that the plaintiffs claimed to charge them a higher rate per ton than they were justified, under s. 90 of the Railways Clauses Consolidation Act, 1845, in charging. It appeared that there was a junction, by means of sidings, at Cudworth, between the line of the plaintiff company and that of the Midland R. Co., and, by an agreement between the latter company and the plaintiff company, the Midland Co. charged a through toll per ton for the carriage of coal from other collieries situate on their line (at a distance from Hull greater than that of the defendants' colliery), over their line and the line of the plaintiff company to Hull. The agreement provided that the Midland Co. should receive the through toll from their customers; that each railway should out of the through toll receive the sum of 2*d.* for "terminal" charges; and that the remainder should be divided between the two companies in proportion to the mileage, the Midland Co. in no case (but that of a colliery called the Monk Bretton Colliery) receiving less than 6*d.* per ton. The appointed part of the through toll which was allotted to the plaintiff company in respect of the carrying of the coal over their line from Cudworth to Hull was less than the rate per ton which the plaintiff company charged the defendants for the carriage of their coal from Cudworth to Hull. For instance, the apportioned part allotted to the plaintiff company of the through toll charged by the Midland Co. for the carriage of coal via Cudworth from the Masborough Colliery, situate on their line sixteen miles further from Hull than the distance of the defendants' colliery from Hull by the plaintiffs' line over the plaintiffs' line to Hull was 2*s.* 1½*d.*, whereas the rate per ton charged by the plaintiff company to the defendants for the carriage of their coal from Cudworth to Hull was 2*s.* 10*d.*

The agreement between the Midland Co. and the plaintiff company for the charge of through tolls was made under s. 87 of the Railways Clauses Consolidation Act, 1845.

The action was tried at Leeds, before Wills, J., who gave judgment for the plaintiffs, on the ground that through traffic carried under an arrangement between two companies, in pursuance of s. 87 of the Railways Clauses Consolidation Act, could not be considered to be traffic carried "under the same circumstances" as that which was carried upon one line of railway only.

The defendants appealed.

A. Charles, Q.C., J. E. Barker, and C. Gould for the defendants.

Sect. 87. "It shall be lawful for the company from time to time to enter into any contract with any other company, being the owners or lessees or in possession of any other railway, for the passage over or along the railway by the special Act authorized to be made, of any engines, coaches, wagons, or other carriages of any other company, or which shall pass over any other line of railway, or for the passage over any other line of railway of any engines, coaches, wagons, or other carriages of the company, or which shall pass over their line of railway, upon the payment of such tolls and under such conditions and restrictions as may be mutually agreed upon; and for the purpose aforesaid it shall be lawful for the respective parties to enter into any contract for the division or apportionment of the tolls to be taken upon their respective railways.

"Sect. 88. Provided always, that no such contract as aforesaid shall in any manner alter, affect, increase, or diminish, any of the tolls which the respective companies, parties to such contracts, shall for the time being be respectively authorized and entitled to demand or receive from any person or any other company, but that all other persons and companies shall, notwithstanding any such contract, be entitled to the use and benefit of any of the said railways, upon the same terms and conditions, and on payment of the same tolls, as they would have been in case no such contract had been entered into."

Sect. 90 provides that "it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit: provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of the railway under the same circumstances, and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or persons travelling upon or using the railway."

LORD ESHER, M.R.—In my opinion this appeal must be dismissed, and I think that in dismissing it we are affirming the judgment of Wills, J., upon the ground on which it was really based. I take it that in substance his judgment was this: that, if he acceded to the argument which was addressed to him for the defendants, he would be interfering with

DISSIMILAR CIR-
CUMSTANCES.

and upsetting all the traffic arrangements made between railway companies throughout the kingdom. Therefore his judgment, as it seems to me, comes to this, that the through traffic arrangements between railway companies, which are made by virtue of s. 87, and the consequences of which are governed by s. 88, are taken out of s. 90. I agree with this view, because, these arrangements being made under s. 87, and the consequences of them being pointed out in s. 88, it is impossible, when you are comparing the through charge which is paid under such an agreement with the toll which is paid by an individual, to say that the circumstances are the same. Sects. 87 and 88, which give power to make these arrangements, prevent the tolls charged under them from being compared with any toll which is charged to an individual under s. 90; the circumstances are thereby made different. The case, when you look at it in that way, is quite clear, and I think the judgment of Wills, J., ought to be affirmed.

BOWEN, L.J., concurred.

FRY, L.J.—I entirely agree. I am inclined, perhaps, to take a slightly different view of the construction of the Act. It seems to me that s. 87 gives power to railway companies to apportion the tolls for a through rate amongst themselves by agreement. Then s. 88 provides, "That no such contract as aforesaid shall in any manner alter, affect, increase, or diminish, any of the tolls which the respective companies, parties to such contracts, shall for the time being be respectively authorized and entitled to demand or receive from any person or any other company." It appears to me that to hold that the taking of an apportioned part of a through toll, when that apportioned part is smaller than the toll charged for the transit simply over the part of the line which is used in common, gives a right under the 90th section to the person who is charged with the latter toll to require it to be reduced, would result in this, that the contract between the two companies would diminish the tolls which one of the companies is entitled to demand. The proviso in s. 88 seems to me to show that an apportioned part of a through rate under s. 87 is not to be deemed a toll under s. 90.

Appeal dismissed.

See previous case and note.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. Co.

v.

KNIGHT.

(122 U. S. Supreme Court Reports, 79.)

A bill of lading, acknowledging the receipt by a common carrier of "the following packages, contents unknown . . . marked and numbered as per margin, to be transported" to the place of destination, is not a warranty, on the part of the carrier, that the goods are of the quality described in the margin.

P. shipped by rail a large quantity of cotton at different times, and at different points south of Texarkana, Ark., to be made up into bales there at a compress-house, and to be thence forwarded to various destinations North and East. The work at the compress-house was to be done by the carrier, but under direction of the shipper, who had control of the cotton there for that purpose, and who selected for shipment the particular bales to fill the respective orders at the points of destination. Bills of lading for it were issued from time to time by the agents of the railroad company, sometimes in advance of the separation by P. of particular bales from the mass to correspond with them. P. was in the habit of drawing against shipments with bills of lading attached, and his drafts were discounted at the local banks. When shipments were heavy, drafts would often mature before the arrival of the cotton. 525 bales, marked on the margin as of a particular quality, were so selected and shipped to K. at Providence, Rhode Island. The bill of lading described them as "contents unknown," "marked and numbered as per margin." The contents of the bales on arrival were found not to correspond with the marks on the margin. The consignee had honored the draft before the arrival of the cotton. He refused to receive the cotton, and sold it on account of the railroad company, after notice to it, and sued in *assumpsit*, on the bill of lading, to recover from the company, as a common carrier, the amount of the loss. *Held*:

(1) That the bill of lading was not a guarantee by the carrier that the cotton was of the quality described in the margin;

(2) That if the railroad company was liable as warehouseman, that liability could not be enforced under this declaration; nor, under the circumstances of this case, by the consignee of the cotton;

(3) That the company was not liable as a common carrier from points south of Texarkana for the specific bales consigned to K.;

(4) That its liability as common carrier began only when specific lots were marked and designated at Texarkana, and specifically set apart to correspond with a bill of lading then or previously issued.

In Illinois, under an unverified plea of the general issue in *assumpsit* against a common carrier for goods lost, the defendant may at the trial deny his liability under the bill of lading; § 34 of the Practice Act having no application to such a denial.

ERROR to the circuit court of the United States for the northern district of Illinois.

Assumpsit against plaintiff in error, defendant below, as a common carrier, to recover on a bill of lading for goods not delivered.

Judgment for plaintiffs. Defendant sued out this writ of error. The case is stated in the opinion of the court.

John F. Dillon for plaintiff in error.

Julius Rosenthal and *Abram M. Pence* for defendants in error.

MATTHEWS, J.—This is an action of *assumpsit* brought by the defendants in error against the St. Louis, Iron Mountain and Southern R. Co. in the superior court of Cook county, Illinois, and removed into the circuit court of the United States FACTS. for the northern district of Illinois by the defendant below, the parties being citizens of different States. The declaration set out several similar causes of action in different counts against the railway company as a common carrier, in one of which it was alleged that the defendant, having received from one G. T. Potter a large number of bales of cotton, described in a certain bill of lading acknowledging receipt thereof, thereby agreed safely to carry the same from Texarkana, in the State of Arkansas, to St. Louis, in the State of Missouri, and thence to Woonsocket, in the State of Rhode Island; and avers that, in violation of its promise and duty, and by reason of its negligence, the said goods became and were wholly lost. The plaintiffs below sued as purchasers of the cotton from Potter and assignees of the bills of lading. The bills of lading sued upon were similar in their tenor, except as to the description of the articles named therein, and commenced as follows: "Received from G. T. Potter the following packages, contents unknown, in apparent good order, marked and numbered as per margin, to be transported from Texarkana, Ark., to St. Louis, and delivered to the consignee or a connecting common carrier." A specimen of what was contained on the margin is as follows:

<p>"Marked. "[PP] Order shipper notify—</p>	<p>List of articles. Seventy-four bales cotton, adv. ch'gs \$111.00</p>	<p>Weight. 85,964</p>
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"B. B. and R. KNIGHT,
"Providence, R. I.

"Deliver cotton Woonsocket, R. I."

Some of the bills of lading specified that the goods were to be transported from Texarkana to Providence, R. I., to be forwarded from St. Louis to destination. The whole number of bales in controversy is 525.

To the declaration the defendant filed a plea of the general issue, which was not verified.

The ground of the complaint on the part of the plaintiffs was, not that they did not receive the whole number of bales called for by the bills of lading, but that, as to the 525 bales in controversy, they were not of the grade and quality designated by the marks contained in the bills of lading. By reason of this difference in quality, on the arrival of the cotton at destination, the plaintiffs

refused to receive the same, and, after notice to the defendant, caused the same to be sold for its account. The amount claimed was the loss thereby incurred.

The cause was tried by a jury, and a verdict and judgment rendered for the plaintiffs for \$11,808.51. A bill of exceptions, duly taken, sets out the entire evidence given on the trial, and the charge of the court to the jury, with the exceptions taken by the plaintiff in error.

The court below in its charge to the jury gave in outline a statement of the main features of the case sufficient for present purposes, as follows:

"The proof tends to show that Potter was a cotton-broker at Texarkana, Ark., in the fall of 1879 and winter following; that he bought most of his cotton at points in Texas on the lines of railroads running south and southwest and west from Texarkana, and that it was brought to Texarkana by these railroads and there delivered upon the platform of what is known in the testimony as the cotton compress company; that this compress company was a corporation whose business it was to compress cotton, and that all the cotton bought by Potter and delivered at Texarkana was to be there compressed before it was shipped east and north by the defendant. This compress company had a large warehouse, where cotton was stored until it could be compressed and made ready for shipment.

"The testimony tends to show the course of business to have been this: Cotton was bought by Potter and delivered into the compress-house. It was there weighed, classed, or graded by Potter, and marks put upon each bale indicating the grade or quality of the cotton and the lot to which it belonged. When Potter had so weighed, graded, and marked a number of bales, he made out a bill of lading, describing certain bales of cotton by the marks on the bales; had the superintendent of the compress company warehouse certify to the fact that the cotton called for by these bills of lading was in the warehouse, and the bills of lading thus certified to by the letters 'O K' and the signature of Martin, the superintendent of the compress warehouse, were signed by O'Connor, the freight agent of the defendant at Texarkana. Potter then drew drafts on the persons to whom he had sold cotton of the grade called for by these bills of lading, attached these bills of lading to the drafts, and some local bank at Texarkana or some of the adjacent towns or cities cashed the drafts, and they went forward to some correspondent of such bank for collection, and in due course of mail and long before the actual arrival of the cotton the drafts were paid; and this seems, from the proof, to have been the course of business between the plaintiffs and Potter.

"There is also testimony in the case given by Potter himself, which tends to show that the bills of lading were issued upon

cotton before it had been received into the warehouse upon some understanding or agreement between Potter and O'Connor that they should be so issued, and that Potter would afterwards put the cotton to respond to those bills of lading into the warehouse.

"It is conceded that the defendant, and it is in fact provided in the bills of lading, that the defendant, the railroad company, should compress this cotton before shipping to the North or East, and that the expense of compressing was paid by the defendant out of its charges for transportation; that some time necessarily elapsed between the arrival of the cotton in the compress warehouse and the time when it was compressed and made ready for shipment. Especially was this so in the fall and early part of the winter when there was a large rush on cotton and it was impossible to compress and handle the cotton as fast as it came in. The cotton therefore accumulated in large quantities in the compress-house, waiting compression and getting ready for shipment.

"And there is also proof in the case tending to show that when it was ready for shipment it was turned out on what was known as the loading platform, and was there shipped to such consignees as Potter directed—that is, bills of lading having been given to various persons, Potter directed to whom he would have each lot, as it was turned out ready for shipment, sent or forwarded.

"The controversy in this case is wholly in regard to 525 bales of cotton covered by the eight bills of lading offered in evidence in this case. These bills of lading, as you will remember, covered a large amount of other cotton which it is conceded was received in due course of business, and answered to the marks of quality which were upon the bales; but it is claimed on the part of the plaintiffs that 525 bales of the whole number of bales covered by the bills of lading were not of the quality called for by these bills of lading, and this suit is wholly in regard to those.

"The plaintiffs claim that, on or about the 9th of April, 1880, there still remained unshipped from Texarkana and in the compress warehouse 525 bales of this cotton, for which they held bills of lading; that, on or about the 9th of April, there remained in the compress-house about 800 bales of cotton of an inferior grade to that indicated by the marks on the cotton called for by these bills of lading; and that certain employees of Potter, as the plaintiffs insist, with the knowledge of O'Connor, the defendant's freight agent, re-marked this cotton with marks indicating the grade or quality called for by the bills of lading; and the defendant forwarded this inferior cotton to the plaintiffs instead of the actual quality called for by these bills of lading.

"The plaintiffs' proof also tends to show that when this inferior cotton arrived at its destination, Providence, Rhode Island, plaintiffs declined to accept it, caused it to be put into an auction house, and sold for the benefit of whom it might concern, notified the

defendant of what they had done before this sale took place, giving the defendant opportunity to reclaim and take the cotton if it saw fit and dispose of it itself; and this suit is now brought to recover the difference between the proceeds of this inferior cotton, as the plaintiffs claim, and the drafts and freight they have paid."

It is not denied that the railroad company delivered to the plaintiffs below the whole number of bales of cotton mentioned in the bills of lading, with external marks thereon as called

BILL OF LADING
DOES NOT OPER-
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for, and that no change was made in the cotton or in the marking thereof after it was loaded on the cars for transportation to Texarkana, and that no damage or loss was occasioned by reason of any want of care or diligence in the transportation. The bill of lading contains no warranty that the goods described shall answer any particular quality, on the contrary, it expressly specifies that the contents of the packages are unknown. That a bill of lading in such cases does not operate as such a guaranty appears from the case of *Clark v. Barnwell*, 12 How. 272, where Mr. Justice Nelson, delivering the opinion of the court (p. 283), said: "It is obvious, therefore, that the acknowledgment of the master as to the condition of the goods when received on board extended only to the external condition of the cases, excluding any implication as to the quantity or quality of the article, condition of it at the time received on board, or whether properly packed or not in the boxes."

The observations of the Master of the Rolls, Lord Esher, in the case of *Cox v. Bruce*, 18 Q. B. D. 147, are very much in point. He says: "But, then, secondly, it is said that, because the plaintiffs are indorsees for value of the bill of lading without notice, they have another right, that they are entitled to rely on a representation made in the bill of lading that the bales bore such and such marks, and that there is consequently an estoppel against the defendants. That raises a question as to the true meaning of the doctrine in *Grant v. Norway*, 10 C. B. 665. It is clearly impossible, consistently with that decision, to assert that the mere fact of a statement being made in the bill of lading estops the ship-owner and gives a right of action against him if untrue, because it was there held that a bill of lading signed in respect of goods not on board the vessel did not bind the ship-owner. The ground of that decision, according to my view, was not merely that the captain has no authority to sign a bill of lading in respect of goods not on board, but that the nature and limitations of the captain's authority are well known among mercantile persons, and that he is only authorized to perform all things usual in the line of business in which he is employed. Therefore the doctrine of that case is not confined to the case where the goods are not put on board the ship. That the captain has authority to bind his owners with

regard to the weight, condition, and value of the goods under certain circumstances may be true; but it appears to me absurd to contend that persons are entitled to assume that he has authority, though his owners really gave him no such authority, to estimate and determine and state in the bill of lading, so as to bind his owners, the particular mercantile quality of the goods before they are put on board, as, for instance, that they are goods containing such and such a percentage of good or bad material, or of such and such a season's growth. To ascertain such matters is obviously quite outside the scope of the functions and capacities of a ship's captain and of the contract of carriage with which he has to do."

It follows, therefore, that if any liability attached to the plaintiff in error upon these bills of lading, it must be by reason of what occurred prior to the actual loading of the cotton upon the cars at Texarkana, when the transportation actually commenced. If Potter had never delivered to the plaintiff in error any cotton at all to make good the 525 bales called for by the bills of lading, it is clear that the plaintiff in error would not be liable for the deficiency. This is well established by the cases of *The Schooner Freeman v. Buckingham*, 10 How. 182, and *Pollard v. Vinton*, 105 U. S. 7. In the latter case, Mr. Justice Miller, delivering the opinion of the court, and speaking of the nature and effect of a bill of lading, says: "It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character, it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter, it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver." And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea. *Baltimore & Ohio Railroad v. Wilkens*, 44 Maryland, 11; *Miller v. Hannibal & St. Joseph Railroad*, 90 N. Y. 430; s. c., 12 Am. & Eng. R. R. Cas. 30. *A fortiori* the carrier is not responsible, as we have already seen, for a deficiency in the quality as compared with that described in the bill of lading if he safely delivers the very goods he actually received for transportation.

It becomes necessary, therefore, further to inquire what facts, happening before the actual loading of the cotton in question on the cars of the plaintiff in error at Texarkana, create a liability on its part to make good the loss complained of by reason of its duty as a common carrier under the bills of lading sued on. On this point, the court below charged the jury as follows:

COMPANY NOT
LIABLE IF NO
COTTON HAD
BEEN DELIVER-
ED.

FACTS CREATING
A LIABILITY—
CHARGES TO
JURY.

"1st. This compress warehouse must be deemed the warehouse of the defendant. If you find from the proof that it was used by the defendant as the place for storing the cotton while the defendant was compressing the same—that is, if while the defendant was getting the cotton ready for shipment north it used the compress warehouse for the purpose of storage, then the compress warehouse must be deemed the defendant's warehouse for that purpose.

"2d. The proof without controversy seems to be that it was understood between Potter and the defendant that all the cotton covered by these bills of lading was to be compressed before it was to be put on the defendant's cars for actual transportation. While it remained in the compress-house for compression, awaiting further shipment, the defendant's liability was that of a warehouseman only, and not that of a carrier; that is, the defendant was liable for due and ordinary care, such as warehouseman are expected to take of property placed in a warehouse for keeping. A common carrier's liability is of an extraordinary character, and covers every risk that the property can be subject to, except a loss by the act of God or by an unavoidable accident, and by the public enemy, unless this extraordinary liability which the law imposes is limited or restricted by the contract between the parties, so that this extraordinary liability, as a common carrier, did not commence until the property was actually loaded or taken for transportation; but the liability was that of a warehouseman until the transportation was actually commenced."

After charging the jury, in the same connection, that the bills of lading were not negotiable, so that any defence open to the plaintiff in error, if sued by Potter, might be made against the plaintiffs below, notwithstanding they had paid value for the property on the faith of the bill of lading, the court further said:

"But this rule must be taken with this qualification, that after the issuing of a bill of lading by the defendant as a warehouseman or common carrier no collusive agreement or conduct between the defendant and Potter can be allowed to prejudice the plaintiffs' rights as holders of these bills of lading. The plaintiffs have the right to have the contract performed substantially as it was made between Potter and the defendant. There can be no substantial change in the terms of the contract to the prejudice of the plaintiffs or any person to whom the contract or bill of lading may be assigned."

The court further charged the jury, that the defendant, as a common carrier, was not a guarantor of the quality of the commodity it assumed to transport, and added as follows:

"This rule may, however, be subjected to a qualification or limitation under the facts in this case as you may find them to be. The proof tends to show that Potter marked quite a large number

of bales with the same grade and lot marks as those described in these bills of lading, and there is proof tending to show that no specific bales of cotton were set apart or considered as forming the particular bales to be shipped on these bills of lading, but it was understood between Porter and the defendant that out of the lot or quantity of bales marked in the manner designated in these bills of lading a sufficient number to make up what are called for by those bills of lading should be shipped. If you so find, then the defendant was bound to ship the number of bales called for by these bills of lading out of the larger quantity bearing the same common marks, and this would be the contract, if you find from the proof that the cotton in question was to be drawn from a larger lot bearing the same common marks.

“The testimony on the part of the defendant tends to show that the defendant’s agents did not know at the time of the issuing of these bills of lading that the marks on these bales indicated the quality or the grade of the cotton; that, so far as Mr. O’Connor and the other agents of the defendant who had the responsible charge of the business at Texarkana were concerned, the marks only indicated a means of identification, and the quality of the cotton was not considered by them; that a bale of cotton to them was only a bale of cotton, without regard to quality; that in shipping the cotton in fulfilment of these bills of lading they only referred to the marks as a means of identifying or determining what cotton they were to ship under each bill of lading.

“As has been stated, the plaintiffs’ proof tends to show that on or about the 9th of April the employees of Potter, with the knowledge of the defendant’s agent, marked a lot of 800 bales of inferior cotton, then in the compress warehouse, with grade-marks corresponding to those called for by these bills of lading, and that the defendant shipped this inferior cotton to the plaintiffs in fulfilment of its contract under those bills of lading; while the defendant’s proof tends to show that the defendant’s agents had no knowledge of the fact that this cotton was of a quality inferior to that called for by these bills of lading, and had no knowledge of the fact that the grade-marks on the bales so shipped had been changed from marks indicating a lower grade to those indicating the grade called for by the bills of lading, but that, on the contrary, they accepted the cotton with the belief that it was the cotton called for by the bills of lading, and which had been delayed in the warehouse up to that time for the purpose of compressing and getting it ready for shipment.

“4th. If the proof in the case satisfies you that the defendant’s agents knew or were informed at the time they shipped this cotton to the plaintiffs or accepted it for shipment that it was of a quality inferior to that called for by the bills of lading which the defendant had issued for it, and knew that the marks on those

bales or packages had been changed from marks indicating a lower grade or quality of cotton to marks indicating the grade called for by the bills of lading, then the defendant is liable in this action for the difference in value between the cotton of the quality called for by the bills of lading and the value of the cotton actually shipped—that is to say, if the proof satisfies you that the agent of the defendant connived at the substitution of a lower and inferior quality of cotton in place of that called for by the bills of lading, although the marks may have been such as called for by the bills of lading, then the defendant is liable. While, if from the proof you are satisfied that when the agents of the defendant actually shipped the cotton they had no knowledge of the difference in quality between the cotton so shipped and that called for by the bills of lading, and had no knowledge that the cotton was, in fact, inferior to that called for by the bills of lading, and that the grade-marks on the bales had been changed from marks indicating a lower grade to marks called for by the bills of lading, then the defendant is not liable.

“You are to determine, then, as a question of fact, from the testimony—

“First. Whether it was in the course of business in the handling of this cotton in the warehouse to set apart and keep separate the cotton covered by each bill of lading from the time such bill of lading was issued, or whether the defendant’s agent, O’Connor, only satisfied himself, through the agency of Martin or his employees, that there was enough cotton, as stated in the bills of lading, to fill such bill as part of a common lot answering to the same description. As, for illustration, there might be in a railroad warehouse in this city, 10,000 barrels of flour of one brand, and ten bills of lading might be issued, each to a different person, calling each for 1000 barrels of this lot of flour. No one barrel would be specifically set apart as belonging to any one of these bills of lading; but any one of the 10,000 barrels would be liable to be shipped on any of these bills of lading—that is, it would be assumed that the entire lot was uniform and alike in quality, and it would, therefore, make no difference to the persons to whom it was shipped which particular barrel of flour he got. If such was the mode of doing business in this compress warehouse, and Potter understood it, then the defendant was not obliged to keep separate cotton called for by each bill of lading, but could fill the bill of lading out of the common lot bearing the same marks.

“Second. Did the agents of the defendant in charge of the issue of these bills of lading and the shipment of this cotton know the grade-marks of this cotton called for by the bills of lading; and did they know that this 525 bales in question was of an inferior grade to that called for by the bills of lading; and did they know-

ingly accept this inferior quality of cotton in place of that called for by the bills of lading, and ship the same to plaintiffs?

"As I have stated, a common carrier is not, as a rule, a guarantor of the quality of the goods transported, but it is bound to transport and deliver the identical goods covered by its contract, where such identity can be established, and, therefore, if at the time these bills of lading were issued it was not intended that they should cover any specific bales, but only a given number of bales, bearing certain common marks, without regard to quality, as understood by the defendant's agents, and that the defendant did ship the number of bales called for by the bills of lading, and marked as required by the bills of lading, with no knowledge or information that the cotton contained in those bales was inferior to that called for by the bills of lading, then the defendant is not liable.

"But if you are satisfied, from the proof, that the agents of the defendant knew at the time they received and shipped the 525 bales in question that it was inferior in quality to that called for by the bills of lading, and that fraudulent or false grade-marks had been put upon these bales corresponding to the marks called for by the bills of lading, then the defendant is liable.

"The defendant having, as I have already stated to you, assumed the responsibility of a warehouseman in regard to this cotton while it was being compressed and prepared for shipment, was obliged to see to it that the cotton it had receipted for was kept on hand for shipment, and had no right, knowingly, to allow a lower grade of cotton to be substituted for that called for by the bills of lading."

The suggestion in the charge of the court of a possible ground of liability on the part of the defendant as a warehouseman was entirely outside of the issues. The defendant was not sued upon the ground of any such alleged liability. LIABILITY OF DEFENDANT AS WAREHOUSEMAN. No facts and circumstances out of which any duty as warehouseman could arise were set out in the declaration; the action was upon the bills of lading alone. The contract alleged to have been made and broken was contained in them. The duty charged to have been violated was the duty of the defendant as a common carrier for an alleged negligence in the transportation of the goods. And if the defendant could be supposed, upon the facts proven, to have incurred liability in its character as warehouseman, as distinguished from its capacity as a carrier, that liability was not incurred in respect to the plaintiffs. It is not charged that the defendant, as a warehouseman, received any goods as their property for the purpose of storage and safekeeping. Its relation as a warehouseman was with Potter, and him alone. It was an error, therefore, in the court to charge the jury that the defendant might be charged in this action for the loss in question upon its responsibility as a warehouseman to the plaintiffs.

It may be contended, however, that in one possible view of the

fact this error was not prejudicial to the defendant. It may be said that the defendant's liability as a common carrier commenced at a time antecedent to the delivery of the cotton to be loaded on the cars; that it might have arisen upon a prior delivery of the cotton in question in the warehouse to be compressed, and then transported, the duty of compressing it, in order to prepare it for transportation, having been undertaken by the defendant. This, however, could only be when the specific goods, as the property of the plaintiffs, were delivered for that purpose into the exclusive possession and control of the defendant. Such was not the case in the present instance. No specific bales of cotton, as the property of the plaintiffs, separate from all others, were delivered to the defendant for them until the 525 bales in controversy were set apart and delivered to the defendant for immediate transportation on its cars; and prior to that time all cotton received in the warehouse to be compressed was received as the property of Potter, on his account, and subject, so far as grading, classifying, and marking were concerned, to his control, and none of it could be considered as having passed into the possession of the defendant as a common carrier for transportation until designated and set apart by Potter or his agents. The cotton received at the compress warehouse came consigned to Potter upon bills of lading issued by other railroad and transportation companies at the point of shipment for delivery to him at Texarkana. Supposing, as one view of the evidence authorizes, the bills of lading were issued by the agents of the defendant to Potter in advance of the actual delivery of the cotton in the warehouse, on the faith of the bills of lading produced and surrendered by him given by other carriers, still the cotton, as it came and accumulated in the warehouse for the purpose of being compressed, continued to be the property of Potter, subject to his control in the respects already mentioned, and until specific lots were marked and designated, so as to correspond with the bills of lading previously issued by the defendant, the latter had no possession of the property as a carrier. The undisputed facts are that the whole quantity of cotton purchased by Potter, and received on his account in the warehouse, did not answer the grades and descriptions according to which he had sold it to different purchasers. He was unable out of the cotton to perform all of these contracts. The whole number of bales received by him were sufficient in number, and they were all transported according to his directions. It is not claimed that any of them were converted to the use of the railroad company, or that any of them were delivered by the railroad company, after they were received for transportation, to any other than the proper consignees.

The court below, however, charged the jury that, notwithstanding "no specific bales of cotton were set apart or considered as

WHEN DEFEND-
ANT'S LIABILITY
AS CARRIER COM-
MENCED.

forming the particular bales to be shipped on these bills of lading," if "it was understood between Potter and the defendant that, out of the lot or quantity of bales marked in the manner designated in these bills of lading, a sufficient number to make up what are called for by those bills of lading should be shipped," that "then, the defendant was bound to ship the number of bales called for by these bills of lading out of the larger quantity bearing the same common marks," if the jury "find from the proof that the cotton in question was to be drawn from a larger lot bearing the same common marks."

This charge seems to assume that, during the progress of the receipt and accumulation of cotton for Potter in the warehouse, there was a sufficient number of bales of the proper grade and quality, and from time to time so marked, to satisfy the bills of lading sued on; and that it was, therefore, the duty of the defendant so to apply them; but it ignores the fact that they were actually applied to satisfy other bills of lading in the hands of parties equally entitled to call for them, and also the more important, because controlling, fact that they were thus applied by the order and direction of Potter, the owner and consignor, who had the right so to direct. There was no relation established between the plaintiffs and the defendant, in respect to the cotton described in their bills of lading, out of which any duty or obligation could arise with respect to it on the part of the defendant until the specific lots of cotton intended for the plaintiffs had been separated and set apart by Potter, and by him delivered to the defendant for immediate transportation, according to the terms of the bills of lading.

The court also instructed the jury, as shown by the extracts from the charge already made, that if the agent of the defendant accepted the cotton in question for shipment, knowing at the time that it was of a quality inferior to that called for by the bills of lading which the defendant had issued for it, and the marks on the bales or packages had been changed from marks indicating a lower grade or quality of cotton to marks indicating the grade called for by the bills of lading, then the defendant was liable. This charge seems to have been given independently of any other circumstances than the mere fact of such knowledge. Possibly it was intended to be taken only in connection with the previous portion of the charge already considered, fixing upon the defendant the duty of selecting the specific quantity called for by these bills of lading out of any larger lot that may from time to time have been on hand in the warehouse answering the same description; and this instruction, therefore, may have been intended by the court as a qualification of what had been previously said. It stands, however, and may have been so understood by the jury, as a complete and separate statement of a distinct ground of liability. In either view, we

KNOWLEDGE OF
DEFENDANT'S
AGENT ACCEPT-
ING THE COTTON.

think it erroneous. If intended as a qualification of the preceding instruction, it does not have the effect of correcting it in the particulars in which we have found it to be erroneous; standing by itself, we think it also to be erroneous. Taken, as it must be, in view of the undisputed facts, it would make it to have been the duty of the defendant, when the cotton in question was tendered by Potter for delivery to the railroad company to be carried under the terms of the bills of lading sued on, to have refused the shipment altogether, on the ground that the goods offered did not correspond in grade and quality with those called for by the bills of lading. As we have already seen, the defendant undertook no such obligation in respect to these plaintiffs. The only alternative, if they did not receive them, would be to reject them altogether, and to refuse to carry them. In that event, upon the facts as they stood, the plaintiffs would have lost the whole 525 bales, instead of merely the difference between the value of those actually carried and those which Potter had agreed to deliver. For, on this supposition, Potter had no other cotton except this to deliver, and the case would have stood, as between the plaintiffs and the defendant, upon bills of lading where no property at all had been received by the carrier for transportation, bringing it exactly within the rule declared in *Pollard v. Vinton*, 105 U. S. 7.

It is argued, however, on the part of the defendants in error, that the defences made by the defendant below, based on the propositions we have considered, were not opened to it on the pleadings. The only plea was the general issue of *non assumpsit*, not verified by an affidavit of its truth. The law of Illinois, as declared by statute, declares that "No person shall be permitted to deny on trial the execution or assignment of any instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be pleaded or set up by way of defence or set-off, or is admissible under the pleadings when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit." Hurd's Revised Statutes of Illinois, Practice Act, § 34. This statute regulates the practice and pleadings in similar cases in the circuit court of the United States for that district by virtue of § 914 of the Revised Statutes of the United States. This provision, however, is not applicable to the circumstances of this case. The execution of the bills of lading, which are the written instruments on which the action is founded, is not denied by anything set up on the part of the defendant below. Their existence and validity, so far as their form and terms are involved, are not in question. The only questions made and decided are those which relate to their legal effect when considered with reference to the facts and circumstances of the case as disclosed in the evidence. The defence actually shown by

PLEADING — DEFENCES OPEN TO DEFENDANT.

them, so far as the present record is concerned, is not that the bills of lading were not valid and binding, but that the contract contained in them has been fully performed by the defendant.

In accordance with these views, the judgment of the circuit court is reversed, and the cause is remanded, with directions to grant a new trial.

Effect of Recitals in Bills of Lading as to Quantity and Value of Goods Received.—Quantity.—Where a bill of lading receipts for a specific quantity or specific weight, it is *prima facie* evidence that the carrier received the quantity or weight named. *McLain v. Fleming*, 2 L. T. N. S. 317; *Hall v. G. T. R. Co.*, 34 U. C. Q. B. 517. Such an acknowledgment, however, is not conclusively binding as between the original parties. It may be contradicted in this respect by parol. *Abbe v. Eaton*, 51 N. Y. 410; *Meyer v. Peck*, 28 N. Y. 590; s. c., 33 Barb. 232; *Dean v. King*, 22 Ohio St. 119; *Steamboat Wisconsin v. Young*, 3 Green, 3 (Iowa), 268; *Kirkman v. Bowen*, 8 Rob. (La.) 246; *The J. B. Brown*, 1 Biss. 76; *Goodrich v. Norris*, Abbott Adm. 196; *L. R. & F. S. R. Co. v. Hall*, 32 Ark. 669; *Hall v. Mayo*, 89 Mass. 454; *Dean v. King*, 22 Ohio St. 119; *Manchester v. Milne*, 1 Abbott Adm. 115; *Blanchett v. Powells Colliery Co.*, 9 L. R. Ex. 74; *Bates v. Todd*, 1 Moody & Rob. 106; *Glass v. Goldsmith*, 22 Wis. 488; *Lane v. B. & A. R. Co.*, 112 Mass. 455; *Graves v. Harwood*, 9 Barb. (N. Y.) 477. In *Hall v. Mayo*, 9 Allen, 454, it was held that the consignee of a cargo cannot maintain an action against the master of a vessel, who has receipted in a bill of lading for a larger amount of goods than was actually put on board, if it appears that the consignee has not paid for the goods on the faith of the bill of lading, and has an agreement with the shippers that he is only to pay them for what he received, unless he can recover of the master the difference between this amount and the amount named in the bill of lading.

Coal was shipped for the port of B., consigned to a railroad company for transportation to W., the bill of lading stating the number of tons and the freight per ton. The company paid the freight to the master of the vessel, and delivered all the coal received at W., but on subsequently weighing it there, the amount was found to fall short of that stated in the bill of lading. It was the known custom of the company not to weigh coal consigned to it, but in the present case its agents could with ordinary care have observed the deficiency in the quantity received. *Held*, that the company was not liable for the deficiency, and was entitled to the full amount of freight paid the master. *Naugatuck R. Co. v. Beardsley Scythe Co.*, 33 Conn. 221. And the fact that the shipper has surrendered to the warehouseman, after the execution of the bill of lading, his warehouse receipt for the full amount named in such bill, will not preclude the ship-owner from disputing the correctness of the bill in that respect. *Glass v. Goldsmith*, 22 Wis. 488.

The *onus* of rebutting the presumption raised by the statement of quantity or weight, rests upon the carrier. *McLean v. Fleming*, 2 L. T. N. S. 317. But though a carrier, in the absence of evidence of fraud or mistake, is concluded by the receipt in his bill of lading, as to the quantity or amount of goods shipped; yet, in an action for the freight, where the consignee has received the goods at the wharf, without qualification or reservation of the right to inspect, weigh, or measure them, and the carrier proves due care of them during the transit, and an actual delivery of all in his possession on his arrival, the burden of proof is on the consignee to establish that a deficiency in the quantity specified in the bill of lading, afterwards discovered, is chargeable to the wrongful act or neglect of the carrier. *McCready v. Holmes*, 6 Am. L. Reg. 229. A custom that an intermediate carrier who received property subject to charges may deduct from the freight earned by a

prior carrier the value of any deficiency between the quantity delivered and that stated in the bill of lading, and that the prior carrier shall not be allowed to show that an error occurred in stating the amount in the bill of lading, is not such a valid custom as the courts will enforce. *Strong v. Grand Trunk R. Co.*, 15 Mich. 205.

The statement in the bill of lading, however, may be made conclusive, by the use of the words "Quantity guaranteed." *Bissell v. Campbell*, 54 N. Y., 353; *Burne v. Weeks*, 7 Bosw. (N. Y.) 372. But a bill of lading, reciting a shipment and agreeing to deliver "twenty-two hundred and eighty-two bushels of corn, more or less, all to be delivered," is complied with by delivering two thousand two hundred and seventeen bushels, if no more is shipped. *Kelly v. Bowker*, 11 Gray, 428. See also *Peebles v. B. & A. R. Co.*, 112 Mass. 98. So, a bill for a specified number of tons of scrap iron, "marked and numbered as per margin," and concluding "weight unknown to" the master, binds the ship-owner to deliver only so much as is actually shipped. *Shepherd v. Naylor*, 5 Gray, 591.

Value.—There is no obligation upon the shipper, when tendering goods for transportation, to inform the carrier of their value, unless he is asked to do so. *Levais v. Gall*, 17 La. Ann. Rep. 302; *Phillips v. Earle*, 25 Mass. 182; *Brooke v. Pickwick*, 4 Bing. 218; *So. Ex. Co. v. Crook*, 44 Ala. 468; *Gorham Mfg. Co. v. Fargo*, 45 How. (N. Y.) Pr. 90; *C. & A. R. Co. v. Baldauf*, 16 Pa. St. 67; *Reef v. Rapp*, 3 W. & S. (Pa.); *Baldwin v. L. & G. W. S. Co.*, 74 N. Y. 125; *Parmelee v. Lowitz*, 74 Ill. 116; *Warner v. West Transp. Co.*, 5 Rob. (La.) 490; *Merchants' Despatch Trans. Co. v. Bowles*, 80 Ill. 473. And where the carrier, knowing the value of the goods, fails to enter it in his receipt, he cannot rely upon a stipulation contained therein limiting his liability to a specific amount (in reality less than the true value of the goods) because the value has not been declared by the shipper. *Kember v. So. Ex. Co.*, 22 La. Ann. Rep. 158; *So. Ex. Co. v. Newby*, 36 Ga. 635; *Stoneman v. Erie R. Co.*, 52 N. Y. 429.

In *Tudor v. Macomber*, 14 Pick. (Mass.), it is held that, as a general rule, the valuation of the cargo in the bill of lading is conclusive between the owner of the ship and the owner of the cargo, in the adjustment of a general average at the home port.

WEYLAND, Trustee,

v.

ATCHISON, TOPEKA AND SANTA FE R. CO.

(*Advance Case, Iowa. June 9, 1887.*)

The plaintiff, on receiving an order from E., doing business at Pueblo, Colorado, shipped to that place over the defendant road a car-load of canned goods consigned to himself. He received from the company two receipts, one of which he indorsed to E., attached it to a draft for the value of the goods, and sent it to a bank at Pueblo for collection; the other was sent to E., without indorsement. E. presented this receipt to the company and received the goods. The company had no knowledge of the receipt and draft. E. refused to pay for the goods, and subsequently became insolvent. In an action against the railroad company to recover the value of the goods, *held*, that the possession by E. of the receipt clothed him with such an apparent right to the goods as relieved the defendant of liability.

APPEAL from superior court of Cedar Rapids.

The defendant is a common carrier of goods, and operates a line of railway in the States of Kansas and Colorado and the Territory of New Mexico. This action was brought to recover the value of a car-load of canned goods which was shipped by the Elgin Canning Co. from Elgin, in this State, to Pueblo, in the State of Colorado. The defendant received the goods from the carrier to whom they were delivered by the consignor, and transported them to their destination, and there delivered them to one O. C. Evans. They were consigned to the shipper, and plaintiff alleges that the delivery was without authority and wrongful, and amounted to a conversion of them by defendant. Plaintiff recovered in the superior court, and defendant appealed.

George R. Peck and Anderson, Davis & Hagerman for appellant.

Henry Rickel for appellee.

REED, J.—There is no dispute as to the facts of the case. Evans was in business at Pueblo as a commission merchant. He sent an order to the Elgin Canning Co., which did business at Elgin, in this State, for a car-load of goods. The canning com-
FACTS.
pany, not being acquainted with Evans, shipped the goods to Pueblo consigned to itself. They were delivered at Elgin to the Burlington, Cedar Rapids & Northern R. Co., and the shipper received two receipts from that company, which are in the usual form of shipping receipts, showing on their face the name of the consignor and the consignee, and the destination of the property; also embodying the shipping contract. It drew its draft on Evans for the value of the goods, and attached it to one of the receipts, which it indorsed, and sent it forward through a bank for collection. The other receipt it sent directly to Evans. When the goods reached their destination, Evans presented the receipt which had been sent him to defendant's agent at Pueblo, who permitted him to take them away. He afterwards refused to pay the draft, and is now insolvent. The receipt was not indorsed or assigned in writing by the shipper; but defendant had no knowledge, when it delivered the goods, that two receipts had been given the shipper, or that it had drawn upon Evans for the price.

The question whether defendant is liable is to be determined from these facts. The conduct of the shipper in consigning the property to itself, and in sending forward the shipping receipt attached to the draft drawn upon the purchaser, very clearly indicates an intention on its part to retain the *jus disponendi*, and if it had done nothing further, and defendant had delivered the property to the purchaser, there would probably have been no question as to its liability; for the law unquestionably is that the carrier takes the

POSSESSION OF
RECEIPT EVIDENCE OF TITLE
TO PROPERTY.

risk of delivering the property to the one entitled to receive it. If he delivers it by mistake, however innocently committed, to a wrong party, or if possession from him is procured by one not entitled to receive it, by fraud, he is liable. Hutch. Carr. § 130; American Exp. Co. *v.* Stack, 29 Ind. 27; Viner *v.* Steamship Co., 50 N. Y. 23. But, if the owner directs or induces him to deliver it to another, he incurs no liability by making the delivery. The consignee is presumptively the owner of the property, and entitled to receive it from the carrier, but the title and right may be passed to another by the transfer to him of the bill of lading, and such transfer may be made by indorsement or assignment. But the delivery of it without indorsement would have the same effect if made with that intent. The question here is not whether, as between the shipper and Evans, the title passed to the latter by the delivery of the receipt to him, but whether he was clothed by that act with such an apparent right to the property as that defendant was warranted in delivering it to him. It is to be borne in mind that the delivery of the receipt to him was the voluntary act of the shipper. No fraud was practised in procuring it; and herein the case differs from Express Co. *v.* Stack, *supra*. In that case the person who obtained the goods from the carrier by fraud procured them to be consigned to a fictitious firm, and by a like fraud procured the bill of lading, and on the strength of his possession of it procured them from the carrier; and the carrier was held liable, on the ground that the one to whom it delivered them was not even apparently entitled to receive them. But in this case Evans did not request that the receipt be sent to him, but the shipper sent it on his own motion.

The question, then, appears to us to be this: Was defendant justified in presuming, from the fact, that the receipt had voluntarily been placed in Evans' hands by the consignor, that he was entitled to receive the property, and in acting upon that presumption? And we think it was. The receipt was the evidence of the title to the property.

The title could be transferred, as we have said, by the mere delivery of the instrument. When defendant delivered the goods, the only fact relating to the transaction of which it had knowledge was that the receipt had been delivered to Evans. There was nothing to suggest that the delivery had been made for any other purpose than to transfer to him the title to the goods. The fair and reasonable presumption arising from that fact, standing alone, was that it was delivered to him for that purpose. As, then, the shipper had voluntarily put into his hands the evidence of title, and clothed him with the apparent ownership of the property, it should not be heard to complain that the carrier acted upon the appearances which it thereby created. If it did not intentionally mislead defendant, it put it in Evans' power to mislead it, and the

case is governed by the equitable rule that, when one of two innocent parties must suffer a loss from the wrong of another, the loss should fall upon the party who put it in the power of that other to perpetrate the wrong.

We think, therefore, that the superior court erred in rendering judgment for plaintiff. Reversed.

Transfer of Bills of Lading without Indorsement.—Bills of lading are not, and cannot be made, by any form of words, negotiable in the sense that commercial paper payable to bearer, or order, or assigns, is negotiable. If words of negotiability be contained in them they only indicate the intention of the shipper as to the person for whose use the consignment is made. These instruments, being symbolical of the property described in them like the property they represent, may be transferred by delivery merely, and this is so without regard to the presence or absence of words of negotiability on their face. *Emery v. Irving Nat. Bank*, 25 Ohio St. 360. And it is a general rule, that when goods are shipped under a bill of lading, drawn to the order of the shipper, the delivery over of such bill of lading unindorsed will pass title to the goods, and authorize the delivery of them by the carrier to the holder. *Merchants' Bank of Canada v. Union R. & Trans. Co.*, Harr. (N.Y.), 249; s. c., 69 N. Y. 373; *Forbes v. Fitchburg R. Co.*, 9 Am. & Eng. R. R. Cas. 80; *City Bank v. Rome, Watertown & Ogdensburg R. Co.*, 44 N. Y. 136; *Mich. Cent. R. Co. v. Phillips*, 60 Ill. 190; *Marine Bank of Chicago v. Wright*, 46 Barb. 45; *Ohio & Miss. R. Co. v. Kerr*, 49 Ill. 459.

Consignee paying Draft attached to Bill of Lading can recover Damages of Carrier for Delivering Goods to Shipper.—Where a shipper attaches his bill of lading to a draft upon the consignee, he thereby expresses his intention to deliver the goods upon payment of such draft, and to retain control of them until such payment, and the carrier who, under such circumstances, delivers them while in transit to the shipper, is liable to the consignee who has duly taken up the draft. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, 32 Fed. Rep. 51.

SWIFT

v.

PACIFIC MAIL S. CO. AND PANAMA R. CO.

(*Advance Case, New York. June 7, 1887.*)

Parties having the control of whale oil taken from whaling vessels at Panama delivered it to the Panama R. Co. for transportation by that company and the Pacific Mail Steamship Co. to New York. The parties delivering the oil for transportation were also the consignees, but there was evidence that certain seamen had an interest in the oil. In an action against the carriers to recover damages for negligence in the transportation of the oil, *held*, that the contracting parties must be assumed to have sufficient title and right to maintain the action; there being no evidence that the seamen were either partners or joint owners with the plaintiff, they were not necessary parties to the action.

A corporate carrier over a portion of a continuous line of transportation

may (within reasonable limits and under such circumstances as are fairly incident to its legitimate corporate business) contract to carry from a point beyond its own terminus to its terminus, and thence over its own route, as well as to carry beyond the terminus of its own route, and such contract is not *ultra vires*.

Where each of two connecting common carriers, forming a continuous line of transportation, is competent to contract alone for transportation over the entire line, they are competent to make a joint contract for such transportation, and thus become joint carriers and jointly liable for loss or damage to goods transported under such joint contract.

Where the evidence warrants a finding that the merchandise transported was delivered to and accepted by the carriers under a special contract, and there is no conclusive evidence that the consignor consented to accept bills of lading in place of such contract, the carriers' liability is fixed by such special contract, and cannot be abrogated or altered by the subsequent signing and mailing of bills of lading by the carriers, which did not reach the consignor (who was also the consignee) until after the loss occurred.

APPEAL from a judgment of the supreme court at general term in the first department, affirming a judgment of the circuit in favor of plaintiffs against defendants jointly in an action to recover damages for the breach of a shipping contract. Affirmed.

This action was brought by the plaintiffs as shippers against the defendants as common carriers to recover damages for breach of a joint contract for the carriage of whale oil from Panama to New York. The complaint alleged that the plaintiffs were copartners and that the defendants were corporations organized under the laws of this State; that the business of the Panama R. Co., among other things, was the transportation of freight from Panama by rail to Aspinwall, and there to deliver the same to the Pacific Mail Steamship Co., whose business it was, among other things, to transport the freight so received by vessel to New York; that the defendants, for a single price named, entered into a joint contract to carry the oil from Panama to New York; that they entered upon the performance of their contract in the months of January and February, 1873, and delivered a portion of the oil received by them from the plaintiffs in the city of New York about the 23d of April, 1873; that owing to the negligence delay and improper handling of the oil, and the casks containing the same, by the defendants, the oil was greatly damaged and injured, and a large part of it was lost by leakage while at Panama, on its way across the Isthmus, at Aspinwall, and also on the passage from Aspinwall to New York; and that by reason of negligence, improper conduct, and mismanagement of the defendants the plaintiffs suffered damages in the sum of \$20,000, besides interest.

Each of the defendants by a separate answer, among other things, denied the joint contract and the joint liability alleged in the complaint; alleged that the oil was delivered and carried under a special contract, printed and in writing, copies of which were delivered to plaintiffs, wherein the several rights and liabilities of

plaintiffs and defendants and each of them (with respect to plaintiffs and to each other relative to the subject-matter of the complaint) were limited, defined, and determined, and that its undertaking in regard to the oil was only under such contract, which it had fully performed; that it was not liable for losses accruing upon the route of the other defendant; and each defendant also alleged as a separate defence that there was a defect of parties plaintiff, and that several other persons named were then, and also at the time of the making of the contract and the transportation of the oil, jointly interested with the plaintiffs in the oil.

The action was brought to trial at a circuit, and the jury rendered a verdict in favor of the plaintiffs for upwards of \$23,000. From the judgment entered upon that verdict the defendants appealed to the general term, and from affirmance there to this court.

George Hoadly and *R. H. Griffin* for the Pacific Mail S. Co.

William G. Choate for Panama R. Co.

Austin G. Fox for respondents.

EARLE, J.—A point is made on behalf of the defendants that the plaintiffs cannot maintain this action on the ground that some of the seamen on the whaling vessels were to some extent joint owners with them of the oil. It is undoubtedly the general rule in this State that an action against a common carrier for the breach of his contract, or of his duty to carry, must be brought in the name of the owner of the goods, although the contract may have been made or the goods shipped by another. *Green v. Clarke*, 12 N. Y. 343; *Krulder v. Ellison*, 47 N. Y. 36. The rule has, however, been much questioned and has some exceptions. *Blanchard v. Page*, 8 Gray, 281; *Finn v. Western R. Corp.*, 112 Mass. 524; *Arbuckle v. Thompson*, 37 Pa. 170.

SEAMEN NOT NE-
CESSARY PAR-
TIES.

Where the consignor, although not the general owner, has a lien upon or a special interest in the goods, and makes the contract and pays the consideration for their carriage, he may bring an action for the breach of the contract in his own name, in order that he may protect his rights. Here these plaintiffs made this contract in their own names, and with their own money paid the agreed freight, and they were both consignors and consignees. It does not appear what ownership the seamen had in the oil, if any, nor does it appear what the relations between the plaintiffs and them were. For aught that appears the plaintiffs were under a special duty to deliver this oil in the city of New York, and had a special interest to protect in the whole of the oil. As they were in control of the oil and made the contract for its transportation, being both consignors and consignees, in the absence of proof to the contrary it must be assumed that they had sufficient title and right to maintain this action and enforce their contract with the defend-

ants; and in so holding it is believed that we are in conflict with no authority.

But the evidence does not show that the seamen were joint owners with the plaintiffs of the oil. It was simply testified that "they were interested in the oil," and that evidence was not sufficient to establish that they were either partners or joint owners with the plaintiffs. It is more reasonable to suppose from such evidence that they were simply interested in the proceeds of the oil; and such is believed to be the common arrangement between the owners of whaling vessels and their seamen, when the latter have an interest in the product of the whaling voyage. *Baxter v. Rodman*, 3 Pick. 435; *Grozier v. Atwood*, 4 Pick. 234; *Bishop v. Shepherd*, 23 Pick. 492.

We are, therefore, of opinion that the seamen were not necessary parties to the action.

The Panama R. Co. was organized to construct, maintain, and operate a railroad across the Isthmus from Panama to Aspinwall, and the Pacific Mail Steamship Co. was organized to navigate steamships on the Pacific and Atlantic oceans. Laws 1848, chap. 266, and Laws 1850, chap. 207.

It is not disputed that the Panama R. Co. could receive freight at Panama and contract to carry it beyond its terminus through to the city of New York, nor that the Pacific Mail Steamship Co. could receive freight at the city of New York and contract to carry it to Aspinwall and thence by the railroad to Panama. It is the well-settled law in this State that a carrying corporation over a portion of a continuous line of transportation may contract to carry beyond the terminus of its route, and that such a contract is not *ultra vires*. *Weed v. Saratoga, etc., R. Co.*, 19 Wend. 534; *Wylde v. North R. Co. of New Jersey*, 53 N. Y. 156; *Root v. Great Western R. Co.*, 55 N. Y. 524; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500.

Such contracts have been upheld sometimes upon the ground of estoppel, and sometimes upon the ground that they were incident to the business for which the contracting corporation was organized. While the defendants admit that such contracts could be made, they contend that the Pacific Mail Steamship Co. could not contract to receive goods away from its terminus and to transport them to such terminus over the route of another carrier, and thence transport them over its own route to their destination. That is, while they admit that the steamship company could receive goods at the city of New York and contract to carry them to Panama on the Pacific coast, they deny that it could receive goods at Panama and agree to transport them to the city of New York.

We see no reason for distinguishing between the two kinds of contracts, and for holding that the company could make the one

kind and not the other. If when it receives goods at New York for transportation to Panama it is engaged in business authorized by its charter or incident to such business, then when it procures freight at Panama for transportation to Aspinwall and thence to New York it is also engaged in promoting the legitimate business for which it was organized. It thus procures freight for transportation upon its steamships; and the business it thus does at Panama and across the Isthmus is just as legitimate as it would be to establish agencies on the Pacific coast to solicit freight for transportation from Aspinwall to New York, or to contract with newspapers there to advertise the carrying of such freight. Cannot a railroad company take freight for transportation at a point a few rods from its depot? And if it may a few rods why not a few miles? If it may have a depot for the receipt of freight one mile from its terminus, why may it not have a depot fifteen or twenty miles therefrom and transport the freight thence to its road by any means that it chooses to adopt?

The Panama R. Co. terminated on the Pacific coast at Panama, and there it owned lighters to go out into the ocean to take freight from vessels. If it could send its lighters out one mile, why could it not send them out several miles for the same purpose to some convenient port or roadstead? The main business of the steamship company between Aspinwall and New York was to transport passengers and freight which came from the Pacific coast, and instead of taking the passengers and freight at Aspinwall why could it not take them at Panama? We see no reason for holding that it might not do so in the prosecution of its corporate business and as incident thereto. Then again, if when the steamship company receives goods at New York under the contract to carry them to Panama it is estopped from denying its authority and power to make the contract, why when it receives goods at Panama under contract to be carried to New York should it not be equally bound by estoppel?

We think, therefore, that it is clear upon principle and authority that both defendants were competent to enter into contract to carry this oil from Panama to New York. And as each was competent to contract alone it cannot be doubted that they were competent to make a joint contract to do it. They could even become partners in the transportation business between Panama and New York; and, so far as we have discovered, the power of corporations thus to become joint carriers has never been denied but has frequently been recognized. *Aigen v. Boston & Maine R. Co.*, 132 Mass. 423; s. c., 6 Am. & Eng. R. R. Cas. 426; *Block v. Fitchburg R. Co.*, 139 Mass. 308; *Gass v. N. Y., etc., R. Co.*, 99 Mass. 220; *Hot Springs R. Co. v. Trippe*, 42 Ark. 465; *St. Louis Ins. Co. v. St. Louis, etc. R. Co.*, 104 U. S. 146; *Barter v. Wheeler*, 49 N. H.

9; *Wylde v. North R. Co. of New Jersey*, *supra*; *Hutchinson Carr.* § 160.

The right of a corporate carrier to go beyond its terminus to procure freight and passengers, and to transport them to its terminus for carriage over its route, is not absolute and unqualified, but has some limitations. What those limitations are it is not possible in a general way to define. The N. Y. Central & Hudson River R. Co. could not establish a line of steamers between Liverpool and New York to carry passengers and freight from Liverpool to New York in order that it might secure the business of transporting such passengers and freight over its route to Buffalo; but it might run ferry-boats from Staten Island, or from the New Jersey shore, for the purpose of securing passengers and freight for transportation over its route. The right to go beyond its terminus to procure passengers and freight for transportation over its route, by a corporate carrier, must be exercised within reasonable limits and under such circumstances that it may fairly be said to be incident to its legitimate corporate business; and our holding is that the Pacific Mail Steamship Co., engaged in transportation upon both the Pacific and Atlantic oceans, did not go beyond reasonable limits in contracting to take freight at Panama and transport it over the Panama Railroad for delivery to its steamships at Aspinwall, its main business being to take freight coming to it over that railroad.

The plaintiffs claim that the contract for the carriage of this oil was made in the city of New York between them and one Bellows, who was the vice-president and general agent of both defendants at that place, and that it was made by correspondence with Bellows and a personal interview had with him. On the other hand, the defendants claim that the contract was contained in and evidenced by the bills of lading signed at Panama by one Corwin, who was the agent of both defendants at that point, which bills of lading expressly stipulated that the defendant should not be jointly liable for any loss or damage to the oil; that neither of them should be liable in any event for any loss or damage accruing upon the route of the other, nor accountable for leakage arising from improper or defective casks, nor for damages of any kind to articles perishable in their nature, nor for unavoidable detention and delay. The trial judge submitted all the evidence bearing upon the contract to the jury, and instructed them to find whether it was made with Bellows as claimed by the plaintiffs, or whether it existed in the bills of lading as claimed by the defendants; and he also instructed them to find whether the contract was the joint contract of the defendants or the individual contract of the Pacific Mail Steamship Co.; and he charged them that if they found the contract existed in the bills of lading they should render a verdict

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BILL OF LADING.

in favor of the defendants; but that if they found it was made with Bellows as claimed by the plaintiffs, and that it was the joint contract of both defendants, they should then render a verdict in favor of the plaintiffs against both defendants. The jury must, therefore, have found that the contract was made with Bellows as claimed by the plaintiffs, and that it was joint; and the only further inquiry is whether there was any evidence to authorize their finding.

There was no proof that Bellows was not authorized to contract for both defendants; nor was there any positive proof that the defendants were not engaged jointly in the business of transportation between New York and Panama. Both defendants had the same agents at Panama and Aspinwall. Bellows was vice-president of both and appears to have acted for both in the city of New York. Both had offices therein the same building, and the interview between Bellows and the plaintiffs took place in the office of the steamship company. He corresponded and held the interview with the plaintiffs in reference to through freight from Panama to New York, and the receipt of the oil at Panama and the care to be taken of it while upon the Isthmus without, so far as appears, consulting with any other agent or officer of either company. It does not appear that any other person acted or was authorized to act for either company at that time and place in making special contracts for the transportation of goods between New York and San Francisco across the Isthmus. It is not disputed that he was authorized to act for and to represent the steamship company, whose office for the transaction of its business he occupied, and he was in the habit of making special contracts for the carriage of freight through between New York and San Francisco.

One of the by-laws of the steamship company provided that the vice-president should be the assistant executive officer of the company, and together with the president should exercise a general superintendence over each department of business in the company's office. Goods on the Pacific coast were brought in vessels and were taken by lighters from the vessels and carried to the docks of the Panama R. Co., and the through freight was divided between the two companies as follows: compensation for the lighterage was first deducted for the railroad company, and the balance was equally divided, although the transportation from Panama to Aspinwall took but four hours, while the voyage from Aspinwall to New York took more than twice as many days.

The first letter written by Bellows to the plaintiffs was one dated September 18, 1871, in which he stated to them that "We will make the rate on whale oil, Panama to N. Y. 5½ cts. gold per gal. Should you decide to send any ships to Panama with oil or bone for N. Y. you will please to give us early notice that we may be prepared to receive it." In August, 1872, the

plaintiffs wrote Bellows, referring to his letter, and stating that their whaling vessels, on their way from the Arctic Ocean to Panama, would be due in San Francisco early in November, and inquiring whether there would be facilities for landing 5000 or 6000 barrels of oil without delay at Panama. To this letter on the 24th of August, 1872, Bellows replied by letter in which he renewed his offer to carry the oil at the rate previously stated in his letter of September, 1871, and stated that there would be no delay in landing at Panama, and closed as follows: "We feel very sure if you once try this route for your oil shipment, you will ever after have all your shipments made over it."

In the same or the following month Swift, one of the plaintiffs, went from New Bedford, Massachusetts, where he resided, to New York, and there had the interview with Bellows at the office of the steamship company in which he alluded to the letter which he had received from him, told him the plaintiffs accepted his proposition and had concluded to order their ships to go to Panama to land their oil, and informed him that if there was any delay in the oil on the Isthmus there would be a great deal of leakage, unless it was in charge of competent coopers. Bellows said they had good coopers on the Isthmus. Swift proposed to send out to Panama some coopers from New Bedford who were very competent, and said that there would be no leakage if they went out. Bellows replied that he could send coopers to Panama, but they would not be allowed to do anything there; that the company had competent workmen to take care of the oil, and plaintiffs' coopers would only be surplusage and entirely unnecessary. Swift also told Bellows that if loss occurred on the Isthmus from delay there on account of the casks not being properly coopered and taken care of, the plaintiffs would hold the company liable for such loss; and Bellows replied that there would be no loss by fault of the company.

Thereafter, on the 14th of October, 1872, the plaintiffs addressed a letter to Bellows in which they acknowledged the receipt of the letter dated August 24, and stated that their three ships might get from 5000 to 6000 barrels of oil, and that they would be due at Panama before the first of December, and further stated:

"We shall depend upon our cargoes having the first chance, and that they will not be crowded out or delayed by oil from other ships whose freight has been engaged subsequently to ours. Please be good enough to write to us on this point and assure us that there will be no delay at Panama or Aspinwall. Can you not send the oil direct to this port (New Bedford)? We beg to ask what facilities there are at Panama to repair the cutwater of The J. Perry, which has been knocked off by the ice quite low down under water. Please state your rate of freight for supplies sent our ships from New York."

To this on the next day Bellows replied, saying that they would

send a copy of their letter "to our agent at Panama with instructions to give your oil after arrival there the best despatch possible. We have a gridiron at Panama on which we take up our coast steamers, and there will be no difficulty in taking up your vessel for the repairs she needs. We inclose you tariff freight rates by our line to Panama." On the 9th of November the plaintiffs wrote Bellows that they had that day learned by telegram that their three vessels had left San Francisco for Panama with 4150 barrels of oil, and they engaged again for freight rates from New York to Panama. To this letter, on the 11th of November, 1872, Bellows replied: "We are pleased to learn that you have three cargoes of oil on the way to Panama from San Francisco, and by steamer; hence to-morrow we will advise our agent at Panama that he may be on the lookout for them;" and he gave rates of freight from New York to Panama.

This correspondence, together with what was said at the interview between Swift and Bellows, made a special contract between the parties under which the plaintiffs were to deliver the oil at Panama; and the principals of Bellows were to receive the oil from plaintiffs' vessels, take it upon lighters to the docks and promptly carry it across the Isthmus to Aspinwall without delay, care for the oil upon the Isthmus and see to the cooping of the casks so that there would be no leakage there, and from Aspinwall transport it to the city of New York. And all this was to be done for the single price stipulated.

The contract so far as it went was complete. It was doubtless expected that bills of lading would be executed, but it could not have been expected that by them the contract so made should in any way be modified.

Under this contract all the oil was delivered in January, 1873, from plaintiffs' vessels; and the only ground the defendants have for claiming that this was not the contract under which the oil was transported is the fact that two months afterward, on the 27th of March, 1873, the common agent of the defendants executed bills of lading which were sent to the plaintiffs and received by them April 7. By some delay on the Isthmus the oil did not reach Aspinwall and was not delivered on the steamships until the second or third of April. After the receipt of the bills of lading the plaintiffs did not discover the peculiar stipulations contained in them at variance with the contract which they had previously made. Upon the landing of the oil in New York the loss of the oil from leakage was discovered, and the plaintiffs paid the stipulated freight, giving notice of their claim for the loss.

Under the evidence, the main features of which we have alluded to, it was certainly competent for the jury to find that the oil was parted with to the defendants, for transportation, and that the defendants entered upon the transportation thereof, under the con-

tract claimed by the plaintiffs. The defendants could not, therefore, abrogate or alter that contract by merely signing and mailing bills of lading which did not reach the plaintiffs until after the oil had left Aspinwall and much, if not all, the loss had accrued. There certainly was no conclusive evidence that the plaintiffs consented to accept the bills of lading in place of the prior contract, and that contract must therefore control. *Bostwick v. Balt. & O. R. Co.*, 45 N. Y. 712; *Guillaume v. General Transatlantic Co.*, 12 Am. & Eng. Corp. Cas. 231, 100 N. Y. 491; *Wheeler v. New Brunswick, etc., R. Co.*, 115 U. S. 29.

It is clear that the plaintiffs did not understand that they were making several contracts for the transportation of their oil from Panama to New York; but they evidently supposed they were making a single contract with an agent who had authority to contract for the entire route. While the evidence is not conclusive, nor even very satisfactory, that the defendants contracted jointly to carry this oil, yet we think there was enough to justify the jury in finding such a contract. Here was the steamship company engaged in transportation both upon the Pacific and Atlantic oceans, making contracts to carry from ports upon one ocean to ports upon the other, and such contracts could be performed only by carriage across the isthmus over the Panama Railroad, and that railroad was engaged in transportation across the Isthmus of freight, almost wholly to or from vessels of the steamship company. The two companies had common agents upon the Isthmus and in New York. Goods were transported in all cases for a single through freight from ports on the Pacific to ports on the Atlantic, and the freight money, after deducting compensation for lightering, was equally divided between the companies, and the same person was vice-president of both companies. Taking into consideration all the matters, the situation of the two companies and all the circumstances surrounding them, and the methods of their business as disclosed in the evidence, it is not an improbable nor an unjustifiable inference that they were jointly engaged in business and jointly contracted with the plaintiffs.

If the contract was made by the correspondence and personal interview with Bellows, as claimed by the plaintiffs and found by the jury, then if the defendants are not jointly liable for plaintiffs' loss, they are severally liable. The whole loss was apparently primarily due to unexplained, unjustifiable delay and carelessness upon the Isthmus while the oil was in the possession of the railroad company. For that delay and loss it is liable as a common carrier upon general principles. The steamship company made a special contract to transport the oil without delay from Panama to New York, and to care for it and cooper the casks upon the Isthmus, and it is liable for the loss by virtue of that special contract. Therefore the defendants are either severally or jointly liable for

the loss, and whether they shall be held for the loss jointly or severally cannot be very important to them, because it is quite certain from their relations to each other that they will be able to adjust between themselves in a satisfactory manner the joint recovery.

The objection to the joint recovery, therefore, appears to be merely technical and should not prevail, unless the judgment is plainly and clearly wrong, and such we think it is not.

A careful consideration of the whole case has therefore led us to the conclusion that the judgment should be affirmed, with costs.

All concur.

Common Carrier Cannot Dispute Title of Party Delivering Goods for Transportation, by setting up Title in Himself or Third Person.—*Lockhart v. Western & Atlantic R.*, 27 Am. & Eng. R. R. Cas. 47.

Partnership Contracts over Connecting Lines.—See *Block v. Erie & N. S. Despatch Fast Freight Line*, 21 Am. & Eng. R. R. Cas. 1-3 and note.

When Parol Agreement for Contract of Carriage is Not Merged in Subsequent Bill of Lading.—See *Hamilton v. Western N. Car. R. Co.*, *ante*, p. 1 and note.

Party Contracting with Carrier may bring Suit for Loss of Goods.—At common law the party to a contract of carriage could maintain an action for its breach, whether he was the owner or not. In the case of *Sargent v. Morris*, 3 B. & Ald. 277, Mr. Justice Bailey says: "Now I take the rule to be this: if an agent acts for me and in my behalf, but in his own name, then, inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely an agent, unless you can also show that he is prohibited from carrying on that action by the person on whose behalf the contract was made. In such cases, however, you may bring your action, either in the name of the party by whom the contract was made, or of the party for whom the contract was made." This is the position taken by a large number of the English decisions. See *Davis v. James*, 5 Bur. 2680, before Lord Mansfield; *Moore v. Wilson*, 1 T. R. 659; *Domett v. Beckford*, 5 B. & Ad. 521; *Strong v. Hard*, 6 B. & C. 160; *Sanders v. Vanzeller*, 4 Ad. & El. N. R. 260; *Joseph v. Knox*, 3 Camp. 320; *Waring v. Cox*, 1 Camp. 369; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Thomson v. Dominy*, 14 M. & W. 403. In *Blanchard v. Page*, 8 Gray, 281, the same view is stated, and it is there held after an extensive and elaborate review of the authorities, by Shaw, C.J., that a consignor was the proper party to sue, though having neither a general nor special property in the goods.

In *Finn v. Western R. Corp.*, 112 Mass. 524, the case of *Blanchard v. Page* was approved and followed, and it was held that a consignor who delivers goods to a carrier can maintain an action of contract against him for their loss, if there is no relation between the carrier and the consignee other than that which results from the carrier's possession of the goods; and in such action can recover the full value of the property, although it be the property of the consignee, if no action against the carrier can be commenced by the consignee; and will hold the proceeds in trust for the consignee's indemnity. Wells, J., said: "There are many cases both in England and in the United States, in which the doctrine appears to be maintained that, except when there is a special contract, a remedy for injury resulting from breach of duty by a carrier can be had only in the name and behalf of some one having an interest in the property at the time of the breach, which is

injuriously affected thereby. The rule might well be conceded if the exception were not too restricted. It will hold good in actions of tort, because they are founded upon injury to some interest or right of the plaintiff, and the cases which support this view are mostly, if not altogether, actions of tort. *Dawes v. Peck*, 8 T. R. 830; also of *Griffith v. Ingledew*, 6 S. & R. 429; *Green v. Clark*, 5 Denio, 497; 13 Barb. 57, and 2 Kernan, 343; and does not appear from the report to be otherwise in *Krulder v. Ellison*, 47 N. Y. 86. In discussing the grounds of decision it seems to have been assumed by various judges, as we think, erroneously, that the right of recovery necessarily involved the question with whom the original contract of service was made. And the effort to make the inference of law as to that contract conform to what was deemed the proper decision as to the right to recover for the injury, has led to some statements of legal inference which appear to us to be somewhat overstrained. Thus, in *Dawes v. Peck*, it is said by Lawrence, J., that in the payment of freight by the consignor he is to be regarded as the agent of the consignee; that the carrier generally knows nothing of the consignor, but looks to the person to whom the goods are directed. In *Freeman v. Birch*, 1 Nev. & Mac. 420, it is said by Parke, J.: 'In ordinary cases the vendor employs the carrier as the agent of the vendee.' In *Green v. Clark*, 13 Barb. 57, it is said by Allen, J., that when the consignee is the legal owner, or the property vests in him by the delivery to the carrier, 'it is an inference of law, and not a presumption of fact, that the contract for the safe carriage is between the carrier and consignee, and consequently the latter has the legal right of action.' But in the same case in the court of appeals, 2 Kernan, 343, it was regarded as immaterial by whom the contract was made, and whether the plaintiff was consignor or consignee, for the purposes of an action of case for negligence by which his property was injured. In *Griffith v. Ingledew*, the dissenting opinion of Gibson, J., assuming that the contract of carriage formed the basis of the action, combats with great force of reasoning the proposition that a contract with the consignee is the legal result of the receipt of goods by a carrier, when no privity with or authority from the consignee is shown, and none professed by the consignor at the time, unless the direction of the goods to the address of the consignee can be taken to be such profession. . . . We do not think the carrier's contract and right to recover his freight can be made to depend upon what may prove to be the legal effect of the negotiations between consignor and consignee upon the title to the property which is the subject of transportation. His contract must arise from the circumstances of his employment. He has a right to look for his compensation to the party who required him to perform the service by causing the goods to be delivered to him for transportation. And that party, unless he is the mere agent of some other, may enforce the contract, and sue for its breach, by the carrier."

In *Northern Line Packet Co. v. Shearer*, 61 Ill. 263, it was held that the person to whom the shipping receipt is given may bring the action, though the property may belong to another. And in *Snider v. Adams Express Co.*, 77 Mo. 523, s. c., 16 Am. & Eng. R. R. Cas. 261, the plaintiff, having sold land as agent of the owner and received the purchase-money, delivered the latter to an express company for transportation to the owner. It was lost in transit. The court held that he could maintain an action for its recovery. Sherwood, J., said: "The contract with the defendant company, for the transmission of the money, for the loss of which suit is now brought, was made by plaintiff, in his own name, without mention of any one as beneficiary of such contract. If so, then it was competent for the agent, with whom the contract was actually made, to sue in his own name, or for his undisclosed principal, with whom in point of law the contract was made, to sue in her own name." Citing *Cothay v. Fennell*, 10 B. & C. 671; s. c., 21 E. C. L. 146; *Story on Agency*, §§ 160, 270, and cases cited; *Ferris v. Shaw*,

72 Mo. 446; and *Blanchard v. Page*, *supra*. In *Southern Exp. Co. v. Craft*, 49 Miss. 480, the court held that in an action against a carrier for failure to deliver, the shipper is the proper party plaintiff, and it does not lie with the carrier who made the contract with him to say, upon a breach of it, that he is not entitled to recover damages, unless it be shown that the consignee objects, for without that it will be presumed that the suit was commenced and so prosecuted, with the knowledge and consent of the consignee, and for his benefit. In *Hooper v. Chicago & N. W. R. Co.*, 27 Wis. 81, it was held that the shipper of goods, who has contracted for their safe conveyance, may sue for injuries thereto in transportation, although the title to the goods has vested in the consignee. In this case, however, the shipper was held to have the title to the goods.

A miller in Suffolk sold flour to the plaintiff, and, according to the usual course of business between them, consigned it to him in Kent, paying the carriage by the Great Eastern to London; and that company delivered it to the South Eastern R. Co., who forwarded it to the plaintiff in Kent, and charged him for the carriage by their line. *Held*, that though the property in the flour might not have passed to the plaintiff under the statute of frauds, still, as he had contracted with the South Eastern Co. for its carriage, he could sue them for damage done to it in the transit over their line. *Mead v. South Eastern R. Co.*, 18 W. R. 785.

While these cases show that in many instances the party contracting for the carriage of the goods has been permitted to maintain a suit against the carrier, although having no property or interest whatever in the goods, yet the weight of authority is undoubtedly to the effect that an action against the carrier for a breach of his contract must be brought in the name of the owner of the goods, although the contract may have been made or the goods shipped by another; and at all events, if suit is brought by the consignor he must retain at least a contingent interest in the goods other than the mere right of stoppage *in transitu*. *Blum v. The Caddo*, 1 Woods, 64; *Griffith v. Ingleden*, 6 S. & R. 429; *Potter v. Lansing*, 1 Johns. 215; *Green v. Clark*, 12 N. Y. 343; *Krulder v. Ellison*, 47 N. Y. 86; *Canfield v. Northern R. Co.*, 18 Barb. 586; *Gwyn v. Richmond, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 452; *Everett v. Saltus*, 15 Wend. 574; *South & North Ala. R. Co. v. Wood*, 72 Ala. 451; s. c., 18 Am. & Eng. R. R. Cas. 634; *Denver, etc., R. Co. v. Frame*, 6 Colo. 382; s. c., 18 Am. & Eng. R. R. Cas. 637; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Dutton v. Solomson*, 8 Bos. & P. 582; *Dawes v. Peck*, 8 T. R. 330; *Cork Distillery v. Great Western, Southern, etc., R.*, L. R. 7 H. L. 269; *Sweet v. Barney*, 33 N. Y. 335; *Conger v. Railroad Co.*, 17 Wis. 447; *W. & A. R. Co. v. Kelley*, 1 Head, 158; *Sanford v. Railroad Co.*, 11 Cush. 155; *Price v. Powell*, 8 N. H. 122; *O'Neil v. Railroad Co.*, 60 N. Y. 138; *Wilson v. Wilson*, 26 Pa. St. 393; *Swain v. Shepherd*, 1 M. & Rob. 223; *Goodwin v. Douglas*, 1 Cheves, 174; *Coates v. Chaplin*, 3 Q. B. 484; 11 L. J. Q. B. 815; *Coombs v. Bristol, etc., R.*, 27 L. J. Ex. 401; 3 H. & N. 510; *Hoare v. Great Western R.*, 37 L. T. N. S. 186, 25 W. R. 631; *Heugh v. London, etc., R.*, 39 L. J. Exch. 48, L. R. 5 Exch. 51.

STATE

v.

GOSS.

(Advance Case, Vermont. June 21, 1887.)

Where an express agent, acting in that capacity, receives at his office a package containing intoxicating liquor, and knowing or having reason to believe or suspect what it contained, delivers the same to the consignee, collects the pay therefor, and transmits it to the consignor, he is liable to conviction under an indictment charging him with the illegal sale of such liquor. But in order that such liability be imposed it is essential that knowledge on the part of the agent, or at least a reasonable suspicion, of the contents of the package should exist.

The rule is the same where the agent delivered the liquor to a stage-driver, who paid for it with money furnished by the consignee, where it did not appear that the express company had undertaken to deliver it beyond the terminus of its own transit; or that the stage-driver was an express carrier; for a delivery to the stage-driver was a delivery to the consignee.

An express company is not bound to transport and deliver intoxicating liquor, if thereby it would incur a penalty.

Nor is such company, as a general thing, bound to know the contents of packages offered for carriage; nor are its agents presumed to know.

COMPLAINT charging the respondent with the illegal sale of intoxicating liquor. Appeal from a justice court to the county court. Trial by jury, June term, 1885, Caledonia county; Ross, J., presiding. Verdict, guilty. Exceptions sustained.

The case appears in the opinion.

L. P. Poland for respondent.

M. Montgomery, State's attorney, and *Mr. Ide* for the State.

ROWELL, J.—This is a complaint in one count for selling, furnishing, and giving away intoxicating liquor contrary to law.

The facts are these: In the summer of 1883, one Pearson, who lived at East Barnett, ordered some lager beer from Bellows Falls, to be sent to him by express, and it came in a box directed to him, and marked C. O. D. The respondent was station agent, and also agent of the express company, at East Barnett, and as such express agent delivered said box and its contents to Pearson, and received from him the designated price of \$1.75 for transmission to the consignor. The respondent had no knowledge of what the box contained; but the State claimed that, from the form and size of the box, and the price paid, he had reason to suspect that it contained lager beer, and that he could have found out by opening the box.

In March, 1884, a box came by express to East Barnett from Manchester, N. H., marked C. O. D., and directed to William

Lowell, of South Danville, which is seven or eight miles from East Barnett. The respondent, as express agent, delivered this box to one Badger, the driver of a daily stage between the two places, to be carried to Lowell; and Badger then, or in a day or two after, paid the respondent the charges thereon, of about \$3.50, with money furnished him by Lowell for that purpose; but the respondent did not know whether it was Lowell's or Badger's money. Before Badger started for South Danville that day, the box was seized by an officer, and he arrested; and on opening the box it was found to contain a gallon of alcohol in a jug. There was no evidence that the respondent knew what the box contained, except that the testimony tended to show that there was such a perceptible odor of liquor emitted from it that he had reason to suspect that it contained liquor; and he admitted that he did so suspect.

The respondent claimed, and requested the court to charge, that as he was an express agent, and his only connection with the matter was in that capacity, his acts were not in violation of law, unless the persons to whom he delivered the boxes obtained the beer and the alcohol for the purpose of disposing of it contrary to law; and that if he knew what the boxes contained it would make no difference; that he could not in any event be made liable unless it was found that he did know what they contained; that delivering them to the persons named, and receiving and remitting the money to the consignors, did not constitute a sale by him for which he could be held liable; and that delivering the box to Badger was only a delivery to another carrier, and not a sale or a furnishing.

The court ruled that it was immaterial whether the respondent knew what the boxes contained or not, and that, upon the facts proved,—which were not disputed,—the respondent was guilty of two illegal sales, and so instructed the jury, which returned a verdict accordingly.

It is undoubtedly true, as contended, that the respondent did not so become the seller of these packages as to make him civilly liable as such. But this does not settle the question; for one may well be criminally liable in respect to a transaction in which he engages as agent, although he is not civilly liable.

A distinction is attempted to be made between the respondent's relation to the alcohol and his relation to the beer; but none exists, we think. It does not appear that the express company had undertaken to deliver the alcohol beyond the terminus of its own transit at East Barnett; nor that, according to the rules and usages of the business, it was its duty to deliver the package to the stage-driver for further transit; nor that the driver was an express carrier, and so the company must be taken to have been the ultimate, and not an intermediate, carrier; and when the stage-driver came with money furnished to him

STAGE - DRIVER
ACTED FOR CON-
SIGNEE.

by the consignee for that purpose, and took and paid for the package, he was acting, and seems to have been regarded as acting, for and in behalf of the consignee; and a delivery to him, in the circumstances, was a delivery to the consignee.

Now, applying the doctrine of *State v. O'Neil*, 58 Vt. 140,—which seems to have received very general approval everywhere,—here were certainly two illegal sales at Barnett, for which the con-

signors might legally be indicted and convicted. But
CONSIGNORS NOT RESPONSIBLE. when the packages came into the hands of the respondent,

no crimes had been committed by any one in respect of illegal sales, for no sales had then been made; the transactions thus far constituted only executory contracts of sales in Bellows Falls and Manchester respectively; the completed sales—the things that constituted the offences—remained to be perfected, and this was done by the respondent. Thus the consignors themselves have committed no crimes by way of illegal sales, except by the hand of the respondent, who, having done the essential acts that constitute the crimes, is responsible on general principles, unless the circumstances shield him.

In *Commonwealth v. Whalen*, 16 Gray, 25, a wife was convicted as a common seller on proof that, in the absence of her husband, she had delivered and taken pay for liquors that he had previously bargained and sold. The court said that a delivery is an essential part of a sale; and that if she acted as the agent of her husband in what she knew to be illegal sales, by making delivery in his absence, it was such a participation in the misdemeanor as to make her responsible.

But do the circumstances shield the respondent? He says they do, because he says it was his duty to deliver the packages as he did, even though he had known their contents, and that he should have been liable had he not delivered them; while, on the other hand, it is said that he was bound to know their contents at his peril, and that his want of knowledge makes no difference.
DUTY OF AGENT TO DELIVER PACKAGE.

Both of these propositions are untenable. As to the first, although express companies are common carriers, and liable as such, yet the law neither requires nor permits them to do illegal acts; and they are not bound to transport and deliver intoxicating liquor or other commodities, if thereby they would commit an offence or incur a penalty. They cannot be allowed, any more than other people, knowingly and with impunity to make themselves agents for others to break the laws of the State.

As to the other proposition, express carriers are not bound, as a general thing, to know the contents of packages offered to them for carriage. If they were it would follow that they might refuse to carry without such knowledge; and as it would be unreasonable to re-
CARRIER NOT BOUND TO KNOW CONTENTS OF PACKAGES—SUSPICIOUS CIRCUMSTANCES.

quire them to accept as conclusive the word of the shipper as to contents, they must have a right to inspect for themselves, as a condition of carrying, which would occasion great inconvenience in practice. But no such right exists, as a general rule.

This precise question was passed upon by the supreme court of the United States in the Nitro-glycerine Case, 15 Wall. 524, where the rule is laid down thus: "It not, then, being his (the carrier's) duty to know the contents of any package offered to him for carriage, when there are no attendant circumstances awakening his suspicion as to their character, there can be no presumption of law that he had such knowledge in any particular case of that kind, and he cannot accordingly be charged, as matter of law, with notice of the properties and character of packages thus received."

In *Crouch v. London & N. W. R. Co.*, 14 C. B. 255, it is said that the proposition that a carrier has in all cases a right to be informed as to the contents of packages brought to him, and may refuse to carry them if the information is withheld, has not a shadow of authority to sustain it except a *dictum* of Best, Ch. J., in *Riley v. Horne*, 5 Bing. 217, and that, in its generality, it cannot stand the test of reasoning. But this case recognizes the right of the carrier to refuse to receive packages offered without being made acquainted with their contents, when there is good ground for believing that they contain anything of a dangerous character; and it is said in the Nitro-glycerine Case that it is only when such ground exists, arising from the appearance of the package, or other circumstances tending to excite suspicion, that the carrier is authorized, in the absence of special legislation on the subject, to require knowledge of the contents of the packages offered as a condition of receiving them for carriage. In England, railway carriers are authorized by statute to refuse to take any parcel that they suspect to contain goods of a dangerous nature, or to require the same to be opened to ascertain the fact.

In *Brass v. Maitland*, 6 Ell. & B. 471, which holds it to be the duty of the shipper, when he offers goods of a dangerous character to be carried, to give notice of their character, the chief justice said: "It would be strange to suppose that the master or the mate—having no reason to suspect that goods offered for general shipment might not be safely stowed away in the hold—must ask every shipper the contents of every package." 1 Smith Lead. Cas., 7th Am. ed. 389, 411.

If, then, in the absence of suspicious appearances or circumstances, an express carrier is neither bound to know nor authorized to find out, as a condition of receiving it, what a package contains that is offered to him for carriage, it would be strange to hold him guilty of a criminal offence because of the character of the contents; for in such case he is bound to carry, and liable if he does not; and the law will not compel a man to act, and then punish

him for acting. Hence, the turning-point of this case is, whether the respondent had reason to believe or suspect—for it appears that he did not know—that these packages contained what they did. If he did, he is charged with notice of their contents, and is guilty; if he did not, he is not charged with such notice, and is not guilty; and as the evidence tended to show he did, and the court ruled the point immaterial, the case must go back for a new trial.

Exceptions sustained, and cause remanded for a new trial.

Carriers Not Bound to Receive Certain Goods.—While the ordinary obligation of a carrier is to receive all goods offered for shipment, he may refuse to accept dangerous articles, and if there is reasonable ground to suspect their character, he may demand to examine them. Without such reasonable ground for suspicion, however, he cannot force the consignor to disclose their nature. *Nitro-glycerine Cases*, 15 Wall. (U. S.) 524; *Boston & Albany R. v. Shanley*, 107 Mass. 568; s. c., 12 Am. L. Reg. N. S. 500.

In *England* by statute (8 & 9 Vict. c. 20, s. 105), it is provided that persons shipping dangerous articles without informing the carrier of their nature must forfeit £20 for every such offence. See *Hearne v. Gatton*, 20 L. J. M. C. 216; 2 Ell. & Ell. 66, 67; *Brass v. Maitland*, 6 Ell. & B. 470; *Farrant v. Barnes*, 11 C. B. N. S. 553; *Williams v. East India Co.*, 3 East, 192; *Alston v. Herring*, 11 Ex. 822; *George v. Skivington*, 5 L. R. Ex. 1.

ALLEN *et al.*

v.

MAINE CENTRAL R. Co.

(*Advance Case, Maine. March 24, 1887.*)

A carrier, on receiving notice from the consignor to stop and retain goods *in transitu*, is bound to act in accordance therewith, although the notice contains no statement of the nature or basis of the claim to have the goods stopped.

If the consignor unreasonably refuse to subsequently furnish the carrier with any evidence of the validity of his claim, such refusal may be considered as a waiver of his right; but in the absence of such unreasonable refusal, the carrier is liable for the value of the goods, if, after receiving such notice, he delivers them to the consignee.

On report. Judgment for plaintiffs.

An action to recover the value of four bales of woollen rags shipped by William F. Allen & Co., at Philadelphia, to William Beatty, of Gray, Me.

Soon after Allen & Co. parted with the goods they learned that Beatty was insolvent, and notified the station agent of defendant

company, who had charge of receipts and delivery of freight at Gray, Me., to stop the transit of the goods. They gave this notice by the following telegram, received at 3.15 of the afternoon of its date:

Philadelphia, March 24, 1884.

Stop and return four bales rags consigned to William Beatty, No. Gray, Maine, marked Diamond P. with B. outside.

W. F. ALLEN & Co.

They also at the same date, March 24, 1884, instructed the agent of the steamship company, the Winsor Line, to have the stock returned, and wrote a letter, in addition to their telegram, to the said station agent of the Maine Central Railroad, at Gray, Me., of which the following is a copy:

WILLIAM F. ALLEN & Co.
Woollen Rags, Wool, and Hair,
No. 132 North St., Philadelphia.

March 24, 1884.

To Ft. Agt. Maine Central R. R., Gray, Maine:

Dear Sir,—We telegraphed you to stop and return four bales rags consigned to William Beatty, No. Gray, Maine, marked Diamond P. with B. outside. We now write to confirm same. Enclosed you will find a postal-card; please make us an early reply and oblige

Yours truly,

W. F. ALLEN & Co.

A postal-card was enclosed, with their printed address upon it, for an answer.

In answer to said letter and said telegram, A. H. Perley, the station agent at Gray, on March 26, 1884, sent the following message upon the postal-card which had been forwarded to him by plaintiffs, to wit:

Gray, March 26, 1884.

Your rags are in freight-house at Gray. Mr. Beatty claims that he can take the rags if he pays the freight. I will do as the company says.

A. H. PERLEY.

This postal-card was received by plaintiffs, as appears by the post-stamp upon it, March 27, 1884; and upon the same day plaintiffs sent another letter to Perley, as follows:

Dear Sir,—Your postal at hand. We are very much obliged to you for the information in reference to rags consigned to Beatty. We have instructed the agent of the Steamship Co. here to have the stock returned, which we trust will be successful; and if we do get them back it is all due to your kindness in notifying us. We enclose you a postal, which, if not too much trouble, would like you to write and state whether the rags have been shipped back or not. Awaiting your reply, we remain,

Respectfully yours,

W. F. A.

Before receiving the last letter, Perley, under date of March 27, wrote Allen & Co. as follows:

You will have to prove that those rags are yours before I can send them;
Mr. Beatty claims them. A. H. PERLEY, Agent.

On March 28, in answer to postal of Perley, of March 27, just quoted, plaintiffs wrote to Perley as follows:

Dear Sir,—Your postal at hand; we have forwarded through the Winsor Line agent our affidavit proving our claim to the goods, which will probably arrive at your end of the line in due time. Our attorney advises this course, although our telegram to you would relieve you of any responsibility; but of course you are the judge of that. As soon as our affidavit arrives, please return stock. Thanking you for your promptness in answering our communication, we remain respectfully yours,
W. F. A. & Co.

On April 1, the general freight agent at Portland received the following letter enclosing an affidavit, a copy of which follows:

Office of the Boston & Philadelphia
Steamships,
E. B. Sampson, Agent, 70 Long Wharf.
Boston, March 31, 1884.

Mr. W. S. Eaton, General Agt. Maine Cen. R. R., Portland:

Dear Sir,—Referring again to the four bales rags consigned to Wm. Beatty, North Gray, Maine, our agts. in Phil. send me copy of bill and deposition of shippers, which I herewith enclose to you. They further say, From what we know of the firm, we believe the goods belong to them (the shippers), and that their request to have them returned should be complied with unless there are some legal proceedings to prevent it. Please advise me result.

Yours truly,

E. B. SAMPSON, Agt.

The bill and deposition are as follows:

Philadelphia, March 15, 1884.

Mr. Wm. Beatty

Bought of Wm. F. Allen & Co.,
Wholesale Dealers of Woollen Rags, Wool, and
Hair, No. 132 North Front Street.

493	4 bales soft woollens,			
467		1,847	9	\$176.41
456				

441 Marked Diamond P with B, outside.

Shipped to North Gray, Maine, via Winsor Line.

State of Pennsylvania. }
County of Philadelphia, ss. }

Before me, the subscriber, a notary public, personally appeared William F. Allen, who, being duly sworn according to law, doth depose and say that he is a member of the firm of Wm. F. Allen & Co., and that said firm of Wm. F. Allen & Co. shipped four bales of soft woollen rags, as is set out on the invoice hereto attached, marked A. J. R. M. ct. P., to Wm. Beatty, of No. Gray, Maine, by the Winsor Line, via Maine Central Railroad.

WILLIAM F. ALLEN.

Sworn to and subscribed before me the 28th day of March, A.D. 1884.

JOSHUA R. MORGAN.

Notary Public.

In the afternoon of March 31, the said station agent at Gray, under threat of immediate suit by Beatty, delivered the goods to him, without waiting longer to receive the affidavit aforesaid.

Clarence Hale for plaintiff.

Drummond & Drummond for defendant.

EMERY, J. The only mooted question in this case is whether the plaintiffs effectually exercised against the carrier their clear rights of stopping the goods *in transitu*. The plaintiffs seasonably telegraphed and wrote the proper officer of the defendant company (the carrier) to stop and return the goods. The defendant company contend the notice was insufficient, because there was no statement of the nature or basis of the claim to have the goods stopped. While such a statement is probably usual, it does not seem necessary in this case. The carrier is presumed to know the law, and, by such a notice as was given here, is effectually apprised of a claim adverse to the consignee, as well as a claim upon himself. In *Benj. Sales*, 1276, while it is said that the usual mode is a simple notice to the carriers, stating the vendor's claim, etc., it is also stated that "all that is required is some act or decision of the vendor countermanding the delivery." *Brewer, J., in Rucker v. Donovan*, 13 Kan. 251 (19 Amer. Rep. 84), said: "A notice to the carrier to stop the goods is sufficient. No particular form of notice is required." In *Clementson v. Grand Trunk R. Co.*, 42 U. C. Q. B. 263, while it was held that the notice was faulty in not identifying the goods, it was said that a specification of the basis of the claim was not necessary.

SUFFICIENCY OF
NOTICE TO STOP.

The defendant further contends that the plaintiffs' omission to afterwards prove to the carrier their right to stop the goods, when requested by the carrier to do so, has vacated their claim, and released the carrier from liability. But the carrier is not the tribunal to determine the rights of the consignor and consignee. Neither of these parties can be required to plead or make proof before the carrier. No man need prove his case to his adversary. It is sufficient if he prove it to the court. The carrier cannot conclusively adjudicate upon his own obligations to either party. He is in the same position as is any man against whom conflicting claims are made. If, as is alleged here, the circumstances are such that he cannot compel them to interplead, he must inquire for himself, and resist or yield at his peril.

SUBSEQUENT
OMISSION TO
SHOW REASON.

It is reasonable, however, that the person assuming the right to stop goods in transit should act in good faith towards the carrier. He should, if requested, furnish him, in due time, with reasonable evidence of the validity of his claim, though it may not amount to proof. Should the consignor refuse such reasonable information

as he may possess, such refusal might be construed as a waiver of his peculiar right, and might justify the carrier, after a reasonable time, in no longer detaining the goods from the consignee. But there was no such refusal here. The plaintiffs sent forward the invoice and their affidavit within a reasonable time.

The plaintiffs have now proved their right to stop the goods, and the defendant company, having denied that right without good reason, must respond in damages.

Judgment for plaintiffs for \$176.41, with interest from the date of the writ.

PETERS, C.J., WALTON, VIRGIN, LIBBEY, and HASKELL, JJ., concurred.

What is Sufficient Notice to Carrier to Stop Goods in Transit.—The carrier is entitled to express notice from the consignor before he will be liable for not stopping goods in transit. To make such a notice effective it must be given at such time and under such circumstances that the carrier may, by the exercise of reasonable diligence, communicate to his servants in time to prevent the delivery of the goods to the consignee. *Whitehead v. Anderson*, 9 M. & W. 518; *Litt v. Cowley*, 7 Taunt. 169; *Ex parte Falk*, L. R. 14 Ch. D. 446; *Ascher v. Grand Trunk R. Co.*, 36 U. C. Q. B. 609; *Bell v. Moss*, 5 Whart. (Pa.) 189; *Mottnam v. Heyer*, 5 Denio, 629; *Bloomington v. Memphis, etc., R. Co.*, 6 Lea (Tenn.) 618; s. c., 6 Am. & Eng. R. R. Cas. 371. In regard to the form of the notice, Benjamin on Sales, 4th Am. ed. § 859, says: "No particular form or mode of stoppage has been held necessary in any case. . . . All that is required is some act or declaration of the vendor, countermanding delivery. *Litt v. Cowley*, 7 Taunt. 169, in the court of common pleas, was a case where notice was given to stop goods; but by mistake of the agent of the carrier, they were delivered. Gibbs, Ch. J., said: "It was formerly held that the only way of stoppage *in transitu* was by actual corporal touch of the goods. It has since been held that after notice to a carrier not to deliver, he is liable for the goods in trover against himself, if he does deliver them." In *Newhall v. Vargas*, 13 Me. 98, on the point of notice the court says: "Notice to the carrier, or to any one having charge of the goods, before the transit ends, is sufficient for this purpose. *Mills v. Ball*, 2 Bos. & P. 457; *Litt v. Cowley*, 7 Taunt. 169." *Rucker v. Donovan*, 13 Kans. 251, 19 Am. Rep. 84, was a case where goods were seized in transit on an execution against the vendee; and after a demand made by the vendor from the officer making the levy, replevin was brought. Brewer, J., delivering the opinion of the court, said: "The facts show a passage of title from plaintiffs to Conner & Co.; and a reinvestment, in the plaintiffs, of title and right to possession is claimed only by virtue of an exercise of the right of stoppage *in transitu*. . . . Actual seizure of the goods before they came into the hands of the vendee is not essential. A demand of the carrier or notice to him to stop the goods, or a claim and endeavor to get the possession, is sufficient. No particular form of notice and demand is required." In *Ex parte Falk*, 14 Ch. D. 446, the notice was by cable from Liverpool to Calcutta, and the court held the notice sufficient. See *Bloomington v. Memphis, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 371 and note; *Poole v. Houston, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 197.

WORDEN

v.

CANADIAN PACIFIC R. Co.

(18 *Ontario Reports*, 652.)

The plaintiff on the 2d March, 1882, delivered to the G. W. R. Co. at L., Ont., 340 bushels of oats, to be carried by said railway and connecting railways to B., Man., and there delivered to the plaintiff. The oats were shipped in car No. 6263, and while in transit were transferred to car No. 8966 of the St. P. M. & M. R. Co. Before the arrival of the oats, the plaintiff arranged with the defendants' agent at Winnipeg to have car 6263 stopped at Winnipeg. The oats were not stopped at Winnipeg but were carried on to Brandon. The plaintiff, before leaving Brandon and making the Winnipeg arrangement, had instructed his agent at Brandon to receive the oats. The oats arrived at Brandon on the 5th May. The plaintiff's agent at Brandon frequently applied for the same, but was informed they had not arrived. The defendants alleged that notice of arrival was sent by post-card to the plaintiff's proper address at Brandon, but there was no evidence to show that this reached the plaintiff, and the goods being of a damageable or perishable nature, were, on 22d July, sold by defendants. In an action for non-delivery and conversion, *held* (reversing the judgment by Galt, J., at the trial), that the plaintiff was entitled to recover; that the defendants were not protected by 42 Vic. ch. 9, sec. 17 (D.), and sub-sections, for to come within it the goods must remain in the defendants' possession for at least a year, unless the tolls have been demanded from the persons liable, and payment refused or neglected for six weeks after demand; and though sub-sec. 3 says nothing of a demand, the whole section must be read together, which shows a demand was required; that the post-card was not a sufficient demand, unless it was shown to have reached the person it was addressed to; that there was no breach in not stopping at Winnipeg, as the contract to stop only applied to car 6263; and that the plaintiff was entitled to recover as damages the value of the oats at Brandon at the time of conversion; but as there was some difficulty in ascertaining this, the court thought substantial justice would be done by allowing the plaintiff the price paid at L. with six per cent interest added.

THIS was an action for a breach of contract for the non-delivery of a quantity of oats; and also for conversion.

The cause was tried before Galt, J., without a jury, at Toronto, at the Fall Assizes of 1886, when the learned judge delivered the following judgment:

GALT, J.—The evidence, which was principally under commission, was very voluminous, but may be summarized as follows: The plaintiff purchased a quantity of oats, which were shipped by the Great Western Railway from Lucknow, under a bill of lading dated 1st March, 1882.

The receipt bill was as follows:

"Lucknow, March 1st, 1882. Received from W. S. Holmes, the undermentioned property, in apparent good order, addressed to order William Worden, Toronto, to Brandon, Manitoba, as car No. 6263, via G. W. R., M. C., C. S. W., St. Paul, M. & M., and C. P. Railways," meaning thereby that the oats were to be shipped in car No. 6263, to be transported therein to Brandon, by the lines of the Great Western Railway, the Michigan Central, and the St. Paul, Minn. & Manitoba Railway, and the Canadian Pacific Railway.

After the oats were shipped, the plaintiff, being in Winnipeg, applied to the agent of the defendants there to stop the oats in Winnipeg; and the following correspondence took place:

WINNIPEG.

MR. HARDER:

I shipped from Lucknow, Ont., on 1st of March, one car of oats consigned to my order, Brandon, in car 6263. I would like to know if you can stop the car here. (Signed) T. W. WORDEN.

To which Mr. Harder replied: "Upon paying all charges, and surrendering original B. of L., you can take delivery of this car here."

From some cause, which is not very clear, it became necessary to unload car 6263; and on the 9th March the oats were transhipped on the Minneapolis & Manitoba Railway to one of their own cars, No. 3966. Car No. 6263 never arrived at Winnipeg, nor was it ever under the control of the defendants. Car 3966 arrived at Winnipeg some time in April, for on 20th April, on the application of one J. H. Christie, what is called a "bill of sight entry" was made at the custom house, Winnipeg, so as to enable the oats to be forwarded to Brandon.

It does not appear that the defendants or their agents had anything whatever to do with this entry; nor is there any evidence that any information was brought to them that the oats in car 3966 had been transferred from car 6263.

The oats were then forwarded to Brandon. On their arrival, notice was given by postal-card, addressed to plaintiff, "Brandon," which is the only address on the shipping bill of the St. Paul, Minneapolis & Manitoba R. Co.

In my opinion, the defendants were in no respect guilty of negligence, and therefore are not responsible as for a breach of contract. In fact they never made any contract with the plaintiff, unless the correspondence that took place between the plaintiff and Harder can be considered as a contract; and, if so, it had reference to the arrival and stoppage of a particular car, which never came into the possession of the defendants.

Then as to the conversion. After the oats had reached Brandon, and several notices addressed to the plaintiff, at Brandon, had been mailed, and as the oats were becoming damaged, the agent of

the defendants directed them to be sold. The car arrived at Brandon on 22d May, 1882. The oats were sold on 22d July, 1882.

By sec. 17, sub-section 3 of 42 Vic. ch. 9 (D.) "If the tolls are not paid within six weeks, the company may sell the whole, or any part of such goods."

It appears to me that the company acted in accordance with this provision, consequently they are not liable for the conversion complained of.

The action must be dismissed, with costs.

Arnoldi for plaintiff.

Wallace Nesbitt and *P. McPhillips* contra.

CAMERON, C.J.—The plaintiff caused to be delivered to the Great Western R. Co., on the 2d March, 1882, at Lucknow, in the province of Ontario, 200 bags containing 840 bushels FACTS. of oats, to be carried by the said railway company, and connecting railways, to Brandon, in the province of Manitoba, and there delivered to the plaintiff. The oats were shipped by the said Great Western R. Co. in their car No. 6263. While the oats were in transit, on account of some accident that occurred on the Minneapolis & Manitoba R., they were transferred from the Great Western car 6263 to car No. 3966 of the said Minneapolis & Manitoba R., and car No. 6263 did not, as far as the evidence discloses, reach either Winnipeg or Brandon.

Before the arrival of the oats at Winnipeg, *en route*, the plaintiff applied to an agent of the defendants at Winnipeg to have the said car, No. 6263, stopped at that place, and was told by the agent that upon paying all charges and surrendering the original bill of lading, he could have delivery at Winnipeg.

Owing, probably, to the change of car, the oats were not stopped at Winnipeg, but were carried by the defendants to their original destination—Brandon.

Before leaving Brandon and making the above arrangement to have the car of oats detained at Winnipeg, the plaintiff instructed an agent to receive the oats for him at Brandon.

The oats arrived at Brandon about the 5th day of May, 1882, and the defendants in their defence alleged that, after the arrival of the oats at Brandon, they caused notice thereof to be sent to the proper address of the plaintiff; and, after the expiration of the time, and in pursuance of the statute in that behalf, the said goods, being of a damageable or perishable nature, and the tolls thereon not having been paid, were sold. This sale took place on 22d July, 1882.

The evidence on the part of the defendants showed that notice of the arrival of the oats at Brandon was given to the plaintiff by postal-card, mailed to his address, Brandon. But it was shown that the agent of the plaintiff at Brandon, without any knowledge

of this notice, applied to the agent of the defendants at Brandon for the oats, and was always informed that no oats had arrived for the plaintiff.

At the trial the learned judge found in favor of the defendants, on the ground that they had acted in pursuance of sec. 17, sub-sec. 3, of 42 Vic. ch. 9 (D.); and dismissed the plaintiff's action, with costs.

Section 17 provides for the fixing and regulating tolls by the by-laws of the company.

STATUTORY PROVISIONS. Sub-section 2 enacts: "In case of denial or neglect of payment, *on demand*, of any such tolls, or any part thereof, . . . the same may be sued for and recovered in any competent court, or the agents or servants of the company may seize the goods for or in respect whereof such tolls ought to be paid, and detain the same until payment thereof; and in the mean time the said goods shall be at the risk of the owners thereof."

Sub-section 3: "If the tolls are not paid within six weeks, the company may sell the whole, or any part of such goods, and out of the money arising from such sale retain the tolls payable, and all charges and expenses of such detention and sale; rendering the surplus, if any, or such of the goods as remain unsold, to the persons entitled thereto."

Sub-section 4: "If any goods remain in the possession of the company unclaimed for the space of twelve months, the company may thereafter, and on giving public notice thereof by advertisement for six weeks in the *Official Gazette* of the Province in which such goods are, and in such other newspaper as they may deem necessary, sell such goods by public auction, at a time and place to be mentioned in such advertisement, and out of the proceeds thereof pay such tolls and all reasonable charges for storing, advertising, and selling such goods; and the balance of the proceeds, if any, shall be kept by the company for a further period of three months, to be paid over to any party entitled thereto."

And by sub-section 5, if such balance be not claimed within the three months, "the same shall be paid over to the receiver-general, to be applied to the general purposes of Canada, until claimed by the party entitled thereto."

It is manifest under these provisions that, to warrant or authorize a sale of goods for tolls, such goods must remain in the possession of the company for at least a year, unless such tolls have been demanded from the person liable to pay the same, and payment thereof has been refused or neglected for the period of six weeks after such demand. Sub-section 3, it is true, read by itself, says nothing about demand of tolls; but the whole section with its sub-sections must be read together to enable the court to put a proper interpretation upon the section and sub-section. Then so read it would be impossible to suppose that the legislature

**WHEN GOODS
MAY BE SOLD.**

could have required all the formalities indicated in section 4 to be taken in order that the owner of the goods might have notice they would be sold, after the goods were held for a year, and yet permit their sale in six weeks under sub-section 3 without demand, notice of sale, or other formality whatever. The provision amounts to a statutory license to sell the goods subject to the condition that there shall be a demand of payment of the tolls upon the consignee, or owner of the goods, at least six weeks before the sale, in default whereof no sale shall take place till the expiration of thirteen months and two weeks after the goods have been carried by the railway to their destination.

It was not argued or contended on behalf of the defendants in this case, that sending the postal-card to notify the arrival of the oats was a sufficient demand; nor could it have been properly so contended.

DEMAND
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In *Simpson v. Routh*, 2 B. & C. 682, it was held under 27 Geo. II. ch. 20, that it was necessary to prove a demand of the overplus where a bailiff distrained for poor-rates. The statute provided that such surplus should be returned on demand.

Chief Justice Abbott, at p. 683, said: "The second section of the Act states 'that the officer making the distress shall deduct the reasonable charges of taking, keeping, and selling such distress out of the money arising by the sale; and the overplus (if any) after such charges and also the said penalty or sum of money shall be fully satisfied and paid, shall be returned, *on demand*, to the owner of the goods and chattels so distrained.' If we were to hold that an action would lie for the surplus without any demand, we should convert the statute into a snare, by which every parish officer would be rendered liable to a variety of actions. If it were necessary to pay the money without demand, it would be incumbent on the officer to follow and make a tender to the party distrained upon, in whatever part of the kingdom he might happen to be."

I refer to this case, not because it at all resembles the circumstances of the one under consideration, but because it determines, where a statute provides for something to be done on demand, the demand is a condition precedent to the enforcement of the things to be done.

In *Belding v. Read*, 3 H. & C. 955, Martin, B., uses language that applies to the insufficiency of the demand alleged to have been made in this case. A right had been given to the defendant by deed to enter the premises of A. and take after-acquired property on demand. A demand was served on A's wife.

At p. 963, the learned Baron said: "But in my judgment the defendant never was in a position to exercise this power, inasmuch as no sufficient demand of payment was ever made; for I think the demand made on the wife was insufficient. There is nothing to

show that the demand on the husband was impracticable, and the deed does not contain any stipulation that a notice may be left at the dwelling-house, though that stipulation is frequently made."

Baron Bramwell, at p. 964, said: "As to the residue of the goods acquired after the bill of sale was executed, the exercise of the power was conditional upon a demand, and no sufficient demand was made."

Channel, B., on p. 966, on the same point, said: "But, inasmuch as the demand made was not a demand in accordance with the power, that was not such an act of intervention as could pass the property."

The disposal of the plaintiff's property under the provision of the Act is a *quasi*-forfeiture, and no forfeiture is permitted except where the act or omission which works the forfeiture is clearly established.

There is a conflict of authorities as to the effect of sending a notice through the general post-office to the address of the party entitled to receive it. Speaking for myself, a notice or demand so sent is of no avail, unless it be shown to have reached the party entitled to it, or that method of giving notice is expressly provided by statute, or the agreement of the parties.

It is unnecessary, however, to pursue this branch of the question any further, as the frequent application of the agent of the plaintiff for the oats, and the information given by the defendant's agent, at Brandon, that they had not arrived, would be such an act of negligence as to disentitle the defendants to avail themselves of sub-section 3 under the notice they mailed to plaintiff, even assuming that notice was in terms sufficient.

By the sale of the oats there was a wrongful conversion by the defendants thereof; and the only remaining question is, what damages the plaintiff is entitled to recover? The correct measure is the value of the oats, at Brandon, at the time of the conversion. It is not very easy to ascertain accurately from the evidence what that value is.

[The learned Chief Justice then considered the evidence as to the damages, coming to the conclusion that substantial justice would be done by allowing the plaintiff the price paid at Lucknow for the oats, with interest at six per cent from 22d of July, 1882, and continued:]

The judgment for the defendants must be reversed, and judgment entered for the plaintiff for \$400.44; that is to say, value of the oats, \$323, and interest, \$90.44, less the sum of \$13 paid into court, with costs.

I quite agree with the opinion of my learned brother Galt at the trial, that the change in the place of delivery that the defendants assented to had relation to the car No. 6263, and as that car

never reached Winnipeg there was no breach of contract or breach of duty on the part of the defendants in delivering the oats in question at Brandon, instead of stopping them at Winnipeg.

ROSE, J., concurred.

GALT, J., having been engaged in the case at the trial, took no in the judgment.

Motion allowed.

Liability of Carrier for Negligence in Not Notifying Consignee of Arrival of Goods.—See *McKinney v. Jewett*, 9 Am. & Eng. R. R. Cas. 209.

Liability of Carrier for Erroneously Informing Consignee of Non-arrival of Goods.—In *Burlington, etc., R. Co. v. Arms*, 16 Am. & Eng. R. R. Cas. 272, it was held that where goods arrived at carrier's station, but consignee was repeatedly informed that they had not arrived, and they were then destroyed by fire, the company was held liable as a common carrier. In *McKinney v. Jewett*, 9 Am. & Eng. R. R. Cas. 209, the bill of lading for certain hams forwarded by a railroad company provided that the company should be liable only as warehousemen, while the goods were "at any of their stations awaiting delivery." It also required all goods to be removed from the cars during business hours. The hams arrived in good time on Thursday at the point of destination, and were allowed to remain locked up in a car. The consignee inquired for them on Thursday and Friday, but was told they had not arrived. On Saturday, at 5.30 P.M., the company informed the consignee of their arrival. On Monday morning the consignee removed them, when they were found to have been damaged by the heat and the detention. In an action by the consignee against the company to recover damages for the loss, *held*, that the company was not exempted from liability by the terms of the bill of lading.

Notice to Consignee of Arrival of Goods.—In *Sherman v. Hudson River, etc., R. Co.*, 64 N. Y. 254, the court observed: "The carrier has not performed his duty, until he has delivered or offered to deliver the goods to the consignee, or done what the law esteems equivalent to delivery. When the consignee is unknown to the carrier, a due effort to find him and notify him of the arrival of the goods is a condition precedent to the right to warehouse them. See also *Spears v. Spartanburg, etc., R. Co.*, 11 S. Car. 158; *Union Exp. Co. v. Ohleman*, 92 Pa. St. 325.

In *Tennessee*, common carriers are required by statute to give the consignee a notice of the arrival of the goods. See Acts 1870, ch. 17; Rev. Stat. sec. 1993j. In *Dean v. Vacaro*, 2 Head, 490, it was held that such was the duty of the carrier irrespective of the statute. In *Butler v. E. Tennessee, etc., R. Co.*, 8 Lea 32, s. c., 9 Am. & Eng. R. R. Cas. 249, the consignee had no fixed residence and the carrier had no knowledge of his temporary stopping-place. It was *held*, that the above statute did not, by prescribing a particular form and manner of notice, change the character of the carrier's liability, and that the latter was not liable for the loss of a trunk stored in his warehouse and burned under such circumstances. See generally upon this subject, *Carriers of Goods*, 2 Am. & Eng. Encyc. of Law, 891.

SCHULZE & Co.
v.
THE GREAT EASTERN R. Co.

(*Law Reports*, 192, B. Div. 20.)

A parcel of samples was delivered to the defendants, a railway company, to be forwarded to the plaintiffs. By the negligence of the defendants, who had notice that the parcel contained samples, it was delayed on the way until the season at which the samples could be used for procuring orders had elapsed, and they had in consequence become valueless. The plaintiffs could not have procured similar samples in the market. In an action for the non-delivery in a reasonable time, *held* (affirming the judgment of Day, J.), that the plaintiffs were entitled to recover as damages the value to them of the samples at the time when they should have been delivered.

THIS was an appeal by the defendants from the judgment of Day, J., at the trial without a jury.

The plaintiffs were woollen merchants, and for the purpose of their business they were in the habit yearly of causing pattern goods to be made. These patterns were made on small looms. Each pattern was then divided into eight or ten pieces so as to make that number of sets of samples. The cost of making was about £630, exclusive of the cost of arranging, dividing into sets, and other work on the samples. One of the sets of samples was sent with a traveller to Italy, but as it was required for a journey which one of the firm intended to make to Paris, the traveller was directed to return it to Galashiels, in Scotland. He accordingly delivered it to the agent of the defendants at Milan, who was informed that the parcel contained samples, and it was forwarded to Basle. Thence it was sent by the defendants, on the 14th of July, and a post-card was despatched to the plaintiffs stating that the goods, described as cotton samples (a mistake for woollen), were due on the 21st of July. The parcel was not tendered to the plaintiffs till the 9th of September following, and was refused by them. The evidence for the plaintiffs was that at the time the samples should have been delivered no other set was available for the journey to Paris, and that it was worth to them £60; that they would have given that sum for such a set, but that it could not be procured in the market or manufactured in less time than a month, or by any other means than by remaking the whole of the patterns. It was also stated that when the parcel was delivered the season for travelling with such goods was over, and the samples were valueless.

On these facts the learned judge held that a carrier who accepts samples for carriage must be taken to know that their value would

be diminished by failure to deliver in a reasonable time, and that the diminution of value in this case was £60. He accordingly gave judgment for the plaintiffs for that amount.

The defendants appealed.

Crumpp, Q.C., and *Douglas Walker* for the defendants.

Moulton, Q.C., and *Woodthorpe* for the plaintiffs.

LORD ESHER, M.R.—I think this case is within *Wilson v. Lancashire & Yorkshire R. Co.*, 9 C. B. (N. S.) 632. These goods were delivered to the carriers under a denomination which the learned judge has found would inform them MEASURE OF DAMAGES FOR DELAY IN DELIVERY OF GOODS. that there was a commercial necessity that the goods should be delivered in a reasonable time. They were not so delivered, and the question is what is to be the measure of damages. In *Wilson v. Lancashire & Yorkshire R. Co.*, 9 C. B. (N. S.) 632, the question arose as to the recovery of damages for a delay by which the plaintiff lost the season. The learned judge who tried the case had told the jury that they were at liberty to take into consideration the fact that the plaintiff had lost the season in consequence of the non-arrival of the cloth in due time, and it was laid down by the court of common pleas that if the meaning of loss of season was that "the goods by reason of their not having been delivered in due time had been lessened in value, that is, if in consequence of the delay they had become of less value to the plaintiff, because the articles to be made up would be less marketable as the time for finding customers for them had gone by, and so the goods were left in the plaintiff's hands deteriorated or diminished in value," then there was not any mistake in point of law in the direction of the learned judge. If it is right here to say that the railway company were bound to know that late delivery of the samples might have the effect of their being left on the consignee's hands at a time when their value to him would be lessened, then these remarks apply to this case. The cases in which the court are bound to consider the market value of the goods are those in which the plaintiff can go into the market and supply himself. If he cannot do so that measure of damages cannot be applied. Here the plaintiffs could not have supplied themselves with the like goods in the market, and the test of damage to be applied is that laid down in *Wilson v. Lancashire & Yorkshire R. Co.*, 9 C. B. (N. S.) 632, within the principle of which this case falls.

FRY and LOPES, L.JJ., concurred.

Appeal dismissed.

Measure of Damages for Delay in Carriage of Goods.—See, generally, *Savannah, etc., R. Co. v. Pritchard*, 28 Am. & Eng. R. R. Cas. 57; *E. Tenn., etc., R. Co. v. Hale*, 27 Ib. 86; *Lindley v. Richmond, etc., R. Co.*, 9 Ib. 81; *Peterson's Case*, 18 Ib. 578; *Houston, etc., R. Co. v. Jackson*, 21 Ib. 126; *Texas Pac. R. Co. v. Nicholson*, 21 Ib. 133; *St. Louis, etc., R. Co. v. Mudford*, 21 Ib. 139-142 and note; *Houston, etc., R. Co. v. Smith*, 22 Ib. 421.

The point in the above case upon which the decision turns is contained in the opinion of the judge in the court below, who held that the carrier who accepts samples for carriage must be taken to know that their value would be diminished by failure to deliver in a reasonable time. This point is affirmed in the court of Queen's bench without comment. The knowledge of the carrier of a commercial necessity for a delivery of the goods within a reasonable time, is rather assumed by the court than established by the facts.

It is well settled that in the absence of an express contract as to the time within which goods are to be delivered, the carrier is bound to deliver within a reasonable time. *Chicago, etc., R. v. Dawson*, 79 Mo. 296; s. c., 18 Am. & Eng. R. R. Cas. 521; *McGraw v. Baltimore, etc., R.*, 18 W. Va. 361; s. c., 9 Am. & Eng. R. R. Cas. 188; *Carriers of Goods*, 2 Am. & Eng. Encyc. of Law, 841, and authorities there cited.

There is no doubt that where the carrier has been given express notice of the fact that delay is liable to result in a special damage, or where such knowledge on his part may be fairly inferred from the circumstances of the shipment, or from the nature of the articles consigned, he is assumed to have accepted the goods with the implied undertaking to respond in damages for a loss by his negligence; but without such express or implied notice only the ordinary liability attaches. *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *Illinois Central R. Co. v. Cobb*, 64 Ill. 128; *W. & W. R. Co. v. Lockhart*, 71 Ill. 627; *Chicago, B. & Q. R. Co. v. Hale*, 83 Ill. 360; *Gee v. Lancashire & Yorkshire R. Co.*, 6 H. & N. 211; *Great Western R. Co. v. Redmayne*, L. R. 1 C. P. 329; *Carriers of Goods*, 2 Am. & Eng. Encyc. of Law, 965 *et seq.*

COMMONWEALTH

v.

THE NEW YORK, LAKE ERIE AND WESTERN R. CO., AND THE
NORTHWESTERN MINING AND EXCHANGE CO.

(*Advance Case, Pennsylvania. January 13, 1887.*)

The New York, L. E. & W. R. Co., a foreign corporation in Pennsylvania, purchased the capital stock of the Northwestern Mining and Exchange Co., a Pennsylvania corporation, reorganized the company, and under its name purchased coal lands. A statute provided that "no corporation other than such as shall have been incorporated under the laws of this State shall hereafter acquire and hold any real estate in this commonwealth, directly in the corporate name, or by or through any trustee, or other device whatsoever, unless specially authorized to hold such property by the laws of this commonwealth." *Held*, that if the purpose of the purchaser was a mere device planned to violate and evade the above act, and if the true ownership of the land was in the foreign corporation, and the name of the Pennsylvania corporation had been merely used as a repository of the legal title to cover up the scheme, then the land purchased was subject to escheat.

The testimony before the jury would have warranted them in finding the issues of fact in favor of the commonwealth, and hence the trial court erred in directing a verdict for defendants.

ERROR to the court of common pleas of Jefferson county.

This was an information and suggestion for a writ of *quo warranto* filed by the Commonwealth—against a foreign corporation with notice to a Pennsylvania corporation controlled by such foreign corporation—to escheat real estate held in the name of the Pennsylvania corporation.

Robert Snodgrass, deputy attorney-general, *Lewis C. Cassidy*, attorney-general, *Silas W. Pettit*, *John R. Read*, *George A. Jenks*, and *William P. Jenks* for plaintiff in error.

George Biddle, *John G. Hall*, and *George W. Biddle* for defendants in error.

STERRETT, J.—It is contended the testimony before the jury would have warranted them in finding the issues of fact in favor of the Commonwealth, and hence the learned court erred in directing a verdict for defendants. It is important, therefore, to notice in the outset the questions of fact raised by the pleadings.

The first count of the information sets forth in substance that prior to committing the grievances complained of, the New York, Lake Erie & Western R. Co., formerly the Erie R. Co., FACTS. a corporation of the State of New York, constructed, maintained, and operated, and yet maintains and operates, a line of railroad from Jersey City, N. J., to Dunkirk, N. Y., and was and yet is engaged in the business of a common carrier on said road; that as such corporation the company was and is prohibited by the laws of this Commonwealth from acquiring and holding therein any lands in the name of, or by or through any trustee, or by any device whatever, and by said laws it was and is expressly declared that any lands so purchased and acquired shall escheat to the Commonwealth; that on July 12, 1878, said company, in its former name of "The Erie Railway Company," purchased and acquired certain lands in Jefferson county in this Commonwealth, in the name of Charles R. Earley, who held the same in trust for the use, benefit, and behoof of said company; that said lands were acquired and purchased by said company without any charter, grant or right whatsoever so to do, and contrary to the express prohibition of the laws of this Commonwealth; and that by reason of the premises said lands became and were escheated, etc.

After setting forth the corporate existence, business, etc., of the railroad company defendant, the prohibition against acquiring and holding lands in this Commonwealth, and the provisions of an act entitled "An Act to incorporate the Northwestern Mining and Exchange Company of Erie, Pennsylvania," approved March 15, 1872, the second count substantially charges that in "November, 1873, said New York, Lake Erie and Western Railroad Company, formerly the Erie Railway Company, without any authority of law it thereunto enabling, acquired all the capital stock of said

Northwestern Mining and Exchange Company, and from thence hitherto has and yet does own, hold or control the same." "That on July, 1874, Charles R. Earley and wife conveyed to said Northwestern Mining and Exchange Co. the lands which the Erie R. Co., now the defendant railroad company, had theretofore purchased and held in the name of said Earley, being the same lands mentioned and described in the first count of the information; that the defendant railroad company, being a foreign corporation, engaged in the business of a common carrier, acquired the capital stock of said Mining and Exchange Co. for the purpose of enabling it to hold the lands which had been so as aforesaid acquired and held in the name of said Earley, in violation and evasion of the laws of this Commonwealth, and so that defendant railroad company might, in like evasion and violation of said laws, hold lands in this Commonwealth not necessary for carrying on its business as a common carrier, and also, in like evasion and violation of said laws, engage within this Commonwealth in mining articles for transportation over its roads, and in business other than that of a common carrier; that under color and by pretended authority of said act of March 15, 1872, the defendant railroad company, in violation and attempted evasion of the constitution, laws, and declared public policy of this Commonwealth, has acquired and yet holds said lands, not necessary for carrying on its business of common carrier, and has and yet does engage in and carry on, within this Commonwealth, business other than that of a common carrier, including the mining of coal for transportation over its roads; that all said acts are contrary to the prerogative of this Commonwealth, and an unlawful encroachment on its power and authority, done in contempt and disregard of the repeated acts of its people and general assembly, positively prohibiting the same;" and that by reason of the premises, said lands became and are forfeited and escheated to said Commonwealth.

In their plea, defendants substantially deny the several illegal acts charged in the information. They say: "The New York, Lake Erie and Western R. Co. does not hold the lands, or any of them, mentioned or described in the information, either directly in the corporate name, or by or through any trustee or other device whatsoever; that each and all of said lands are owned and held by the Northwestern Mining and Exchange Co., the other defendant in this action, directly in its corporate name;" that the said Northwestern Mining and Exchange Co., duly incorporated under the act of March 15, 1872, was and is authorized to acquire and hold the lands mentioned and described in the information and complaint of the plaintiff, as well as to mine coal and other minerals and deal in the same; "that a large majority of the stock of the Northwestern Mining and Exchange Co. is held and controlled by the New York, Lake Erie & Western

R. Co., a corporation organized under the laws of the State of New York and existing under the laws of that State as well as under the laws of Pennsylvania, and that a small minority of said stock is owned by sundry citizens of Pennsylvania and New York, but defendants are advised and believe that the holding of said stock as aforesaid is not in violation of the laws of Pennsylvania.

“And the defendants deny that said lands are held as aforesaid for the purpose of enabling the New York, Lake Erie & Western R. Co. to engage in business other than that of a common carrier, and deny that the products of said lands are intended for transportation over said railroad of said company in Pennsylvania.”

“And for further plea to the first count of said information, the defendants say, the New York, Lake Erie & Western R. Co. did not purchase and acquire the lands in said count mentioned in the name of Charles R. Earley, as trustee; that the said Charles R. Earley purchased said lands from sundry individuals in his own right and for his own use and benefit, and subsequently, to wit, the 13th day of July, 1874, conveyed the same to the Northwestern Mining and Exchange Co. aforesaid, at considerable advance in price, thereby making large profits to himself.”

They further say, “they have done no act contrary to the prerogative of Pennsylvania as an independent State, and have committed no unlawful encroachment upon its power or authority, or any cause of forfeiture of the lands of the Northwestern Mining and Exchange Co. aforesaid, but have in all things complied with the laws of said Commonwealth.”

It will be observed that the burden of the Commonwealth's complaint is not that there was any thing wrong, *per se*, in Dr. Earley purchasing large bodies of coal and timber lands and afterward conveying them to the Northwestern Mining and Exchange Co., for the purpose of developing the same and transporting the product; nor in the Erie R. Co., or its successors, the defendant railroad company, in good faith and for a legitimate purpose, investing part of its capital in stock of the Mining and Exchange Co.; but the gravamen of the complaint is that said lands were purchased at the instance and for the benefit of the Erie R. Co. and held in trust for it; that afterward said railway company, for the purpose of better enabling it to use and control said lands and enjoy the full benefit of the same without appearing to be the beneficial owners thereof, purchased the charter of the Northwestern Mining and Exchange Co. and caused said lands to be conveyed to it; that all this was done, not in good faith nor for any legitimate object, but for the purpose of concealing the real ownership of said lands, and thus evading and violating the laws of this Commonwealth prohibiting the holding of lands therein for the purposes for which said lands were purchased,

owned, held and used; and that defendant railroad company, as successor of the Erie R. Co., in like evasion and violation of said laws, acquired, holds, controls, and uses said lands in a manner and for purposes forbidden by law.

To maintain the issue on the part of the Commonwealth, the attorney-general introduced testimony tending to prove substantially all the material allegations of fact put in issue by the pleadings. Among other things, he put in evidence the contract of July 19, 1873, between Dr. Earley and Mr. Watson, then president of the Erie R. Co., embracing over twenty thousand acres of coal lands, including the lands in question; and, in connection therewith, proved by Dr. Earley and others, that in the transaction Mr. Watson acted for and on behalf of the railroad company, giving as a reason for using his own name in the contract, "that it must not be known the Erie R. Co. was purchasing mineral or mining property in Pennsylvania," etc. Dr. Earley also testified in substance that the consideration for the lands was paid or secured by the railroad company. In short, that the company through his agency purchased and paid for the lands. He also testified in regard to the purchase of the charter of the Northwestern Mining and Exchange Co.; that the attorney acting for the railroad company declared they must have "a charter to cover the lands purchased, the bituminous coal lands," as the company could not hold them in its own name. "Nor could Mr. Watson hold them as trustee." The result was that the charter of the Northwestern Mining and Exchange Co., then in the market for sale, was selected, and the witness, Dr. Earley, was deputed to purchase it and did buy it for the railway company for \$5000. The same witness then testified, in detail, how the directors of the Mining and Exchange Co. resigned and their places were immediately filled by the election of persons who were either officers or employees of the Erie R. Co., the then owner and holder of all the stock ordered to be issued by the new board of directors of the Mining and Exchange Co., except ten shares given without consideration to each of the directors to render them eligible. These shares or certificates of stock were indorsed in blank and deposited with the treasurer of the railway company, so that in fact that corporation actually owned and controlled all the stock of the Northwestern Mining and Exchange Co., whose charter it is alleged to have purchased for the purpose of making it the mere repository of the legal title to the lands in question. The testimony further shows that the lands were conveyed by Dr. Earley to the Mining and Exchange Co. pursuant to assignment of the contract by Mr. Watson. It also tends to show that the stock of the last-mentioned company, respecting the lands in question, continued to be held by the Erie R. Co. until all its property, rights, franchises, etc., were sold and subsequently transferred to its succes-

sor, the New York, Lake Erie and Western R. Co. We might refer at considerable length to other portions of the testimony corroborative of the testimony of Dr. Earley, and tending to prove other allegations of fact put in issue by the pleadings, but it is unnecessary. It is sufficient to say that the testimony introduced by the attorney-general tended to prove substantially all the disputed allegations of fact.

The defendants having offered no testimony, the court was requested, on behalf of the Commonwealth, to charge:

"*First.* That if the Erie R. Co., a corporation of the State of New York, bought and owned the lands described in the information in the name of its president, and then purchased the charter of the Northwestern Mining and Exchange Co. and caused all the stock to be issued to itself, directly or indirectly, only as a device or cover to avoid the escheat imposed by the laws of the State of Pennsylvania, the lands so purchased are subject to escheat by proceedings in this case, and if the jury so find, their verdict should be for the plaintiff.

INSTRUCTIONS
REQUESTED BY
COMMON-
WEALTH.

"*Second.* That if the purchase of the charter of the Northwestern Mining and Exchange Co. in aid of its own purposes, and as a mere device under which the Erie R. Co. intended to hold and own the lands in dispute, and under which the New York, Lake Erie & Western R. Co., in pursuance of such purchase, holds and enjoys the lands in dispute, such purpose and use of the name of the Northwestern Mining and Exchange Co. will not defeat an escheat in this case, and if the jury so find, their verdict should be for the plaintiff.

"*Third.* If the jury find that the New York, Lake Erie & Western R. Co. is the actual owner of the lands described in the information, and the use of the name of the Northwestern Mining and Exchange Co., and the stock claimed to be issued thereby, is only colorable, and a device to cover and conceal the true ownership, the verdict of the jury should be for the plaintiff."

The learned judge refused to affirm either of these propositions for the following reasons embodied in his answer to the first, viz.: "If the New York, Lake Erie & Western R. Co. had used the name of another as trustee, or by any device had used even a corporation as trustee, and if the jury so found, the lands would be liable to escheat; but, under the facts in this case, we answer the point in the negative. They have used a Pennsylvania charter, and although they virtually paid for all the stock—giving to certain persons ten shares and using them as directors—we do not think that the lands are subject to escheat. In other words, we think if there is anything vicious in the organization, the plaintiff ought to have proceeded to forfeit the charter or dissolve it."

REASONS FOR
REFUSAL.

If we were prepared to concede that mere form is everything and substance nothing, we might, perhaps, better appreciate the force of these reasons; but we are unwilling to admit

TRANSACTION A
DEVICE TO EVADE
THE LAW.

that a transparent device, deliberately planned and executed for the purpose of concealing the true character of the transaction, is entitled to such consideration in a court of justice. The learned judge appears to have thought that inasmuch as a Pennsylvania charter was purchased by the railroad company, and the legal title to the lands in question vested in the corporation organized under that charter, the lands are not subject to escheat, notwithstanding the transaction, from its very inception, is shown to be a mere device to cover and conceal the actual ownership of the lands, and thus evade the provisions of the fifth section of the act of April 26, 1855, which declares: "That no corporation other than such as shall have been incorporated under the laws of this State shall . . . hereafter acquire and hold any real estate within this Commonwealth, directly in the corporate name, or by or through any trustee, or other device whatsoever, unless specially authorized to hold such property by the laws of this Commonwealth." In this we think he was mistaken. If either the organic or statute law of the State can be successfully circumvented and evaded by any device, however ingenious it may be, there would be little or no protection in either.

The plaintiff's propositions were not refused because the question of fact they involve are not raised by the pleadings, nor for the reason that the testimony is insufficient to warrant the submission of those questions to the jury. The testimony was, therefore, for the jury, and they should have been permitted to pass upon it and find the facts.

In defendant's first point, the court was requested to charge:

CHARGE AS TO OWNERSHIP OF LANDS. "That the evidence shows the Northwestern Mining and Exchange Co. acquired and now holds in its own name both the legal and equitable title to the lands in controversy."

In the absence of qualifying facts which the jury would have been warranted in finding from the testimony before them, this proposition may be regarded as correct; but it was for the jury to inquire and find from the testimony how and for what purpose, and by whom, the lands were acquired and held. If they were in fact purchased and owned by the railroad company, and, as part of the scheme and device to conceal the true ownership and evade the law above quoted, the railroad company used the mining and exchange company as a mere repository of the legal title, it would be a travesty of justice to hold that the mere outward form of the transaction would preclude inquiring into its real character.

In affirming defendants' second point, the learned judge in-

structed the jury, "That the acquiring and holding of the stock of the Northwestern Mining and Exchange Co., in whole or in part, by the New York, Lake Erie & Western R. Co. is not an acquiring and holding by the latter company in its corporate name, or by or through any trustee or device whatsoever of the lands in controversy, within the meaning of the sixth section of the act of April 26, 1886, upon which this action is based, and, therefore, the verdict of the jury must be for the defendants." What has just been said in relation to the first point is applicable to this. Whether such acquiring and holding is a "device," within the meaning of the section above quoted, depends largely on qualifying facts which might have been found by the jury had they been permitted to consider and pass upon the testimony.

WHETHER
TRANSACTION
WAS "DEVICE"
DEPENDS UPON
FACTS.

If it be true that the railroad company defendant has in fact acquired and holds real estate within this Commonwealth, it is incumbent on the company to show that it has been specially authorized by law to hold such property. In the absence of such proof, the acquisition and holding are illegal; and the ninth section of the act prescribes the remedy, viz.: "All property hereafter acquired and held by persons, corporations or associations forbidden by this act to hold the same, or held contrary to the intent of this act" . . . "shall escheat to this Commonwealth, and upon the same being adjudged to have escheated under proceedings in court by *quo warranto* in all respects, as is provided by law in the case of the usurpation of any corporate franchise, the same shall be taken in possession and disposed of," etc.

STATUTORY PRO-
VISIONS — WHAT
IS REFERRED TO.

Neither of the acts of assembly referred to by defendants authorizes or sanctions such acquisition and use of real estate, as are suggested in the points for charge submitted by the Commonwealth. It is one thing for a railroad company to invest its surplus funds in the stock of another corporation, or to aid a corporation authorized by law to develop the coal, iron, or other material interests of the Commonwealth, in the manner specified in the act of April 15, 1869; but it is another and quite a different thing to purchase and hold real estate contrary to law; to purchase the charter of a mining company, and use it as a mere device to cover and conceal the true ownership of realty which the law forbids it to acquire or hold in the name of the trustee or by any "device whatsoever."

We have treated this case as a proceeding under the act of 1865, without reference to the effect of section 5 of article 17 of the present Constitution upon the rights of the railroad company defendant. There is certainly nothing in that section that can, by any possibility, be invoked in aid of the defendant's position.

The points submitted by the Commonwealth were clearly warranted by the pleading and evidence and should have been affirmed. Judgment reversed and a *venire facias de novo* awarded.

Power of Foreign Corporation to Hold Land.—As a general rule a corporation organized under the laws of one State, and competent under the laws of such State to take the title to real estate therein, is also competent to take title to real estate in another State, unless prohibited by statute; this capacity rests upon the same principles of comity as their capacity to make or enforce contracts, hold and convey personal property. *Thompson v. Waters*, 25 Mich. 214. In this case Chief Justice Christiancy, in a very logical and exhaustive opinion, reviews the principles of comity and public and legislative policy which permits a corporation to hold land in a State other than the one of its creation. He observes: "When, therefore, a corporation is created in the State of Indiana, with powers, so far as that State can give them, of taking, holding, and conveying lands in this State, I do not see upon what principle it can be held that an affirmative enabling act in this State is necessary to give them the capacity to take, hold, and convey such lands here, unless our legislature have, expressly or by implication, forbidden it. The question of capacity seems to me to rest upon the principle of comity, as much as their capacity to make or enforce contracts, or to acquire, hold, or convey personal property. I say the question seems to me to rest upon the same principles, but by this I do not mean that there may not be stronger reasons against recognizing the capacity as to land than as to personal property; but these are all reasons of public policy which bear upon the question of comity, and, therefore, more appropriate for the legislature than the courts. Thus the main, if not the only, reasons to be apprehended from allowing corporations, domestic and foreign, to take, hold, or convey lands, are: 1st. The dangers of their becoming speculators in lands to large amounts, keeping them unimproved and thereby retarding the progress of settlement and improvement, or, if improved, preventing settlers from obtaining clear and independent titles, and introducing a system of tenancies in which the tenants would be, in a great measure, dependent upon such corporations. 2d. The holding of such lands for a long period of time, as they pass by perpetual succession without any change or break by death, as in the case of natural persons. And 3d. The influence which wealthy corporations, holding large bodies of land in the State, might exercise upon the legislature. These considerations apply with no particular force to railroad corporations as such, but equally to banking, manufacturing, and other corporations; and they are all very proper considerations for a constitutional convention, in framing the fundamental law, and for the people in adopting it, as well as for the legislature, who, in all matters not fixed by the constitution, are properly vested with the power of determining the public policy. And in a case where it should very clearly appear to the court from the amount of the lands purchased, or the purpose for which they were purchased, or other circumstances, that the dangers I have mentioned were seriously to be apprehended, it may be (though the present case does not call for an opinion upon this point) that the court would be authorized without any legislative prohibition to that end, to refuse to recognize the law of the State creating the corporation, or so much of it as had undertaken to confer the right of holding such lands; and, consequently, to treat the conveyance as void for want of such capacity. But when from the nature of the case no such danger can be reasonably apprehended, I see no very intelligible ground upon which the court could thus treat the conveyance as void, unless the legislative department, in some way, have clearly indicated a policy which requires it. . . . Now, whatever danger might be apprehended

from allowing corporations of other States to take lands for stock, or for purposes of speculation, I cannot conceive that the privilege of taking lands, in good faith, in payment of debts, and which must therefore be merely occasional, and with the intention and for the purpose of converting them into money for the realization of the proceeds, can be so dangerous to the public interests of this State or its citizens, as to authorize the courts to declare such conveyance void on that ground; especially as the property could only be held for ten years, under the constitutional provision already cited. And I think it may be laid down as a safe and sound principle that, unless the constitution of the State or its legislature have, either expressly or by clear implication, declared a contrary rule, the courts of any State are bound to recognize this right of the corporations of other States thus to realize and collect the debts due them; and such seems to have been the course of the decisions of the several States where this question has arisen. See *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Lumbard v. Aldrich*, 8 N. H. 31; *New York Dry Dock v. Hicks*, 5 McLean, 111; *Lothrop v. Commercial Bank of Scotia*, 8 Dana, 114." And this view is supported by the great weight of authority. See *Christian Union v. Yount*, 101 U. S. 356; *Colwell v. Springs Co.*, 100 U. S. 55; *National Trust Co. v. Murphy*, 30 N. J. Eq. 408; *De Camp v. Robbins*, 29 N. J. Eq. 36; *Bunyan v. Coster's Lessees*, 14 Pet. 122; *State v. Boston, etc., R. Co.*, 25 Vt. 433; *Claremont Bridge Co. v. Royce*, 42 Vt. 736; *Cincinnati, etc., R. Co. v. Pearce*, 28 Ind. 502; *Northern Trans. Co. v. City*, 7 Biss. 45; *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 73; *Columbus Buggy Co. v. Graves*, 108 Ill. 459; *Barnes v. Suddard*, 13 Am. & Eng. Corp. Cas. 7. They may acquire realty by mortgage and foreclosure. *Am. Mut. Livery Co. v. Watson*, 81 Mass. 491; *Farmers' Loan and Trust Co. v. McKinney*, 6 McLean, 7; *Bard v. Pool*, 12 N. Y. 495; *Hards v. Conn. Mut. Life Ins. Co.*, 8 Biss. 236; *Elston v. Piggot*, 94 Ind. 14; s. c., 8 Am. & Eng. Corp. Cas. 185; *Life Ins. Co. v. Overholt*, 4 Dill. 287; *Stevens v. Pratt*, 101 Ill. 206 (overruling *U. S. Mortgage Co. v. Gross*, 93 Ill. 483); *Lebanon Savings Bank v. Hollenbeck*, 29 Min. 322. *By devise*: *Am. Bible Soc. v. Marshall*, 15 Ohio St. 537; *Thompson v. Swoope*, 24 Pa. St. 480 (overruling *Meth. Ch. v. Remington*, 1 Watts, 218); *White v. Howard*, 38 Conn. 342; *Santa Clara Academy v. Sullivan (Ill.)*, 13 Am. & Eng. Corp. Cas. 11.

The Pennsylvania Statute Prohibiting Foreign Corporations to Acquire and Hold Real Estate.—In the case of *Hickory Farm Oil Co. v. Buffalo, etc., R. Co.*, 32 Fed. Rep. 22 (decided since the principal case), it is *held*, that under the Pennsylvania act of April 26, 1855, which forbids a foreign corporation to acquire and hold real estate, a deed of conveyance of land to such a corporation is not void. It passes the title, and the corporation may hold the land subject to the commonwealth's right of escheat. And that the commonwealth alone can object to the legal capacity of a corporation to hold real estate.

The leading case in Pennsylvania on the subject of the effect of a conveyance of real estate to a corporation forbidden by law to "purchase and hold" the same, is that of *Leazure v. Hillegas*, 7 Serg. & R. 313, in which it was *held*, that such corporation might purchase and take title to the real estate; its title, however, like that of an alien, being defeasible at the pleasure of the commonwealth. That case, and the later case of *Goundie v. Water Co.*, 7 Pa. St. 233, settle the principle that the commonwealth alone can object to a want of capacity in a corporation to hold land. In *Runyan v. Lessee of Coster*, 14 Pet. 122, the supreme court of the United States, following the ruling in *Leazure v. Hillegas*, sustained the right of a foreign corporation to maintain an action of ejectment for land which it was not licensed to hold under the laws of Pennsylvania, the commonwealth not having exercised its right of escheat. The supreme court of Pennsylvania had occasion to con-

sider the act of April 26, 1855, in the case of *Slate Co. v. Savings Bank*, 8 Wkly. Notes Cas. 430, and therein declared that it was a mortmain act, disabling foreign corporations from acquiring and holding real estate, but the commonwealth only can take advantage of the disability, and that it was not intended that a deed to a foreign corporation should be void so as not to pass the estate of the grantor.

CANAL AND CLAIBORNE ST. R. CO.

v.

CITY OF NEW ORLEANS *et al.*

(*Advance Case, Louisiana. May 23, 1887.*)

The original grantee from the city of New Orleans of a franchise or privilege of a right of way over certain streets for railroads, for a term of 20 years, cannot, after the expiration of said term, enjoin the city from advertising and selling the same franchise, on the ground that the city has failed to comply with its alleged contract obligation to take and pay for its "railroad, rolling stock, equipments, and fixtures."

Such failure, even if the obligation existed, could not operate to prolong the franchise, or to restrain the city in the exercise of its sovereign authority over its streets for the benefit of the people to whom they belong in common.

The specifications of the proposed sale cover only the franchise of the right of way, and do not propose to sell any property of plaintiff, all of whose legal rights are expressly reserved under a clause requiring the purchaser to respect and equitably settle for them; and, under the same clause, plaintiff may compete at the sale without waiving any rights.

APPEAL from civil district court, Orleans parish.

H. D. Ogden and Braughn, Buck, Dinklespiel & Hart for plaintiff and appellant.

W. H. Rogers, city attorney, and *Wynne Rogers*, assistant city attorney, for defendant and appellee.

FENNER, J.—In 1867 the city of New Orleans sold to C. A. Labuzan & Co. (who subsequently transferred to plaintiff) the "right of way," or "the privilege of the right of way," to establish railroads on Claiborne and other streets, for passengers only," which right and privilege was awarded and transferred for the term of 20 years. The contract contains the usual specifications as to routes, method, and material of construction, and various other matters not necessary to detail, and also the following stipulation: "The said railroads, rolling stock, equipments, and fixtures to revert to the city of New Orleans at the expiration of said twenty years' privilege, on a valuation to be ascertained by two

disinterested persons, one to be appointed by the purchaser, and the other by the city; and, in the event of a disagreement as to said valuation between said persons thus appointed, a third person or umpire shall be appointed by one of the district courts of and in the city of New Orleans, the decision thereby had to be final and binding."

The 20 years, for which the privilege and right of way was sold, having expired, the city proposed to sell, and advertised for sale, the same privilege and right, with certain extensions and modifications, upon specifications adopted and published by the city. Plaintiff brings the present suit to enjoin this sale, on various grounds, and brings up the present appeal from a judgment of the court *a quo*, maintaining an exception of no cause of action interposed by the city, and dismissing the suit.

The grounds of plaintiff's claim are, substantially (1) that, under the reversion clause of the original contract heretofore quoted, appraisers had been appointed to value "the railroads, rolling-stock, equipments, and fixtures;" and that they had agreed upon a valuation of \$223,664.74, which, it alleges, was binding, and had the effect of *res adjudicata*; that the city was bound, by its contract, to take the property at its valuation, and to pay for the same; and that it has no right to sell the right of way heretofore enjoyed by plaintiff without first paying for its property as aforesaid, or, at least, that it can only sell it subject to a condition imposed on the purchaser to take and pay for said property. The city responds that the reversion clause imposed no obligation whatever on the city to take or pay for plaintiff's property, but merely gave it the privilege of taking it at the appraised value, if it should desire to do so.

RIGHT OF CITY
TO SELL RIGHT
OF WAY, WITH-
OUT PAYING FOR
PROPERTY.

Irrespective of this controversy, which we find it unnecessary to decide, we do not see how the failure of the city to comply with such obligation, even if it existed, could give to the plaintiff any other right than to claim its judicial enforcement by ordinary legal remedies. It is impossible that such failure should operate to prolong plaintiff's right to exercise the right of way by a railroad over the public streets, after the expiration of the term for which that privilege was granted; or to prevent the sovereign power of the city, delegated by the State over the public streets, from immediately attaching, free from such privilege, or to restrain the city, in the exercise of the same sovereign power, from again granting the right of way on such terms and conditions as it may choose, consistent with the general rights of the public.

We have heretofore held that, as stated in the Code itself, "the streets, public walks, and quays are things which belong in common to all the inhabitants of cities and other places, to the use of which all the inhabitants, and even strangers, are entitled in common;" that the right of the city in regulating them, and in granting proper

rights of way over them for railroad purposes and the like, "emanate from the State, which, in the exercise of its sovereignty, has delegated them;" that "the power to dispose of a franchise (right of way), being an attribute of sovereignty, is one which no extrinsic power can set in motion, and which requires, as a *primum mobile*, the volition of the being in whom it was vested, which is, in the present instance, the city of New Orleans." Board of Liquidation v. City, 32 La. Ann. 915.

In the exercise of her sovereign right and volition, the city sold to plaintiff the privileges of this right of way for 20 years, and no longer. The term has expired. The plaintiff has no longer any such right or privilege. The sovereign rights of the city have re-attached, absolutely free from any privilege of plaintiff. Her sovereign power over her streets, delegated for the convenience and welfare of her people, cannot be restrained in its exercise, to await the settlement of controversies touching rights and obligations, not concerning the franchise or privilege itself, but other private property.

2. It is claimed that the specifications, under which the sale is proposed, violate plaintiff's right of property, because they locate the route precisely where plaintiff's tracks now are, and also because they contain the clause, "the existing tracks in the above-enumerated routes may be used." Under the views heretofore expressed, plaintiff's right to occupy the streets with railroads, or to use the right of way over them, has absolutely expired, and the city has the power to sell and locate the right of way, thereafter to be granted, according to its will. So far as the grant of the right to "use existing tracks" contemplates the use of plaintiff's cross-ties, iron, and other severable property, it would be mere *brutum fulmen*, not binding on plaintiff, and which it could resist, or exact compensation therefor. We find, however, another clause in the specifications which rob this grant of all significance, viz.: "If anything in these specifications are in conflict with any rights or privileges granted to any person or company prior to this grant, the purchaser must equitably settle all such conflicts, and hold the city harmless for all consequent damages." This evidently operates as a reserve of all plaintiff's existing rights, whatever they may be, and warns the purchaser that they must be respected or settled equitably.

3. The same clause destroys the last contention of plaintiff, viz., that it has the right to be the bidder at any public sale of the franchise, but that it is excluded from bidding, under the proposed specifications, because it cannot do so without abandoning its rights of property, and insisting on the payment by the city of its appraised value. Whether or not this would be a ground for injunction, it is obvious that, under the clause above quoted, no such obstacle exists to its becoming a bid-

**SPECIFICATIONS
OF SALE.**

**RIGHT OF PLAINTIFF
TO BECOME
BIDDER.**

der, and that it may purchase, if it should be the adjudicatee, without waiving any of its legal rights; and that any other purchaser who should seek to use "existing tracks," could not use plaintiff's property, situated on said tracks, without an equitable settlement therefor. Indeed, the city does not propose to sell or transfer any property of plaintiff, but only the privilege or franchise of the right of way, plaintiff's interest in which has absolutely terminated.

Judgment affirmed.

Rehearing refused.

CHESAPEAKE, OHIO AND SOUTHWESTERN R. Co.

v.

GREIST.

(*Advance Case, Kentucky. May 19, 1887.*)

The plaintiff brought suit against the defendant company to recover damages on account of personal injuries received while in the employ of a company to which the defendant is the successor, the old company having been dissolved by sale. *Held*, that the plaintiff cannot maintain his action against the new company. His only right of action remaining is against the stockholders of the old company, who received the purchase-money.

APPEAL from circuit court, Hardin county.

Holmes Cummins, Wm. Wilson, J. P. Hobson, and P. H. Darby for appellant.

Matt. O'Dougherty, R. C. Davis, and C. D. Walker for appellee.

PRYOR, C.J.—The appellee, William F. Greist, while in the employ of the Paducah & Elizabethtown R. Co., and running one of its excursion trains from Cecilia, in Hardin county, FACTS. to the city of Paducah, was severely injured by the collision of the engine with horses upon the track, by which the engine ran off the roadbed and capsized, crushing and wounding him in a frightful manner. He instituted this action against the Chesapeake, Ohio & Southwestern R. Co. and the Paducah & Elizabethtown R. Co., alleging, in substance, that the injury resulted from insufficient air-brakes, that were defective, and so known to the defendants, and unknown to the plaintiff, and which, if in proper condition, would have enabled him to check the train, and have prevented the injury. His claim for damages was allowed to the extent of \$10,000 against the Chesapeake, Ohio & Southwestern R. Co. alone, the Paducah & Elizabethtown R. Co. not being served with process, or appearing in the action.

The Chesapeake, Ohio & Southwestern R. Co. was incorporated in the month of January in the year 1882, and the accident resulting in injuries to the plaintiff occurred in July, 1881. The claim against this corporation is attempted to be maintained on the idea that by its charter, and the contract by which it became the owner of the Paducah & Elizabethtown R. Co., the two were consolidated, and constituted the one corporation; and, further, that by the terms of the purchase the present appellant undertook to discharge all the liabilities of the Paducah & Elizabethtown R. Co. A demurrer was filed to the petition, on the ground that it presented no cause of action against the appellant, and the demurrer was overruled. An answer was then filed to the petition, the first paragraph of which denied any responsibility for the tort complained of, or for any personal injury to the employee while engaged in the service of the Paducah & Elizabethtown R. Co.; maintaining that the agreement by which it became the owner of the last-named corporation was a deed of bargain and sale, entered into by both corporations under their respective charters. The identical question, in fact, is made by this paragraph of the answer that was raised by the demurrer to the petition.

We must look to the writing, therefore, by which the appellant acquired the Paducah & Elizabethtown Railroad to determine the liability of the one for all the debts and liabilities of the other. The facts alleged in the petition constitute a cause of action against the Paducah & Elizabethtown R. Co., and, if the appellant is liable in this case, it must be by reason of the contract between the two corporations. The deed of bargain and sale recites that "the one has bargained and sold, and by these presents doth grant, bargain, and sell, alien, convey, and confirm, unto the Chesapeake, Ohio & Southwestern Railroad all the railroad, and its properties," naming them specifically, to have and to hold in fee, including "all debts, dues, and demands, of whatever nature, due, or to become due, to it, and all the rights, privileges, and franchises belonging to, or appertaining to, the P. & E. R. Co." The consideration for this sale was over \$70,000 in money, and \$2,853,000 in negotiable bonds, and the assumption of certain mortgage liens that were on the road; and, further, the appellant bound itself to pay all sums lawfully due for taxes, and all current indebtedness incurred by the party of the second part in the operation of said railroad and property.

The Paducah & Elizabethtown R. Co. was authorized by its charter, with the assent of a majority in value of the stock of the company, to sell or lease its road, and the power to purchase was conferred on the appellant; so no obstacle existed to the consummation of such a transaction but the consent of the stockholders, as provided by the several charters. That consent was obtained, and the legal effect of the agreement was to transfer to the appellant all the rights, property, etc., of the Paducah & Elizabethtown

R. Co. free from the claims of creditors. It was a *bona fide* purchaser, paying full value for the road. At least, the validity of the transaction is nowhere assailed; and, in such a state of case, we are aware of no rule of law or equity that would follow the property in the hands of a *bona fide* purchaser for the benefit of a creditor who has no liens, by law or contract, as against it or the property sold.

If the corporation had but changed its name, with the same stockholders, or with additional stockholders, it would be regarded as the same corporation. Here, however, is a great line of railroad, incorporated under the name of the Chesapeake, Ohio & Southwestern R. Co., with responsibilities greater than those belonging to the corporation whose property has been purchased by it, with different stockholders, and property-rights that were, before and after the purchase, disconnected from the interest of stockholders in the corporation purchased, and it cannot be well argued that the two have consolidated, or have each a common interest in the appellant. No stockholder in the Paducah & Elizabethtown R. Co. held stock as such in the Chesapeake, Ohio & Southwestern R. Co., but, on the contrary, the stockholders in the Paducah & Elizabethtown R. Co. were paid off in bonds by the appellant, extinguishing the existence of all the property-rights of the latter company, and in fact it may be said to have no longer an existence, except for the purpose of winding up the affairs of the company.

A creditor of the corporation, whether from an express or implied contract, subjects himself, when dealing with it, to the powers conferred by the charter. If the power to sell is given by the terms of the grant, the purchaser for value holds the property as if it had been an individual transaction. There is no reason for making the distinction, and the rule in individual transactions should apply as between corporations, where the power to sell and purchase is conferred by the charter. While a dissolution of a corporation would entitle the creditors to enforce their demands in a court of equity, or, where there is a consolidation, to follow the assets of their debtor in the consolidated company, still, where there is a sale of the corporate property, it passes the title as to all, in the absence of some reservation in the charter protecting the rights of creditors. Mor. Corp. 567,569. Where the corporation is dissolved or is consolidated, the assets of the company are a trust fund for the payment of its debts, and may be reached by a court of equity.

What, then, is the remedy of the appellee in this case, in the event he is entitled to a judgment against the Paducah & Elizabethtown R. Co.? If a sale in good faith has been made to the appellant,—and that is not questioned,—the stockholders of the Paducah & Elizabethtown R. Co., having received a consideration

for their stock, would scarcely be permitted to hold the proceeds in their pockets, and the debts of the company be left unpaid. An equivalent has been paid by the appellant, in money and bonds, that have passed to the stockholders of the old corporation. This must be regarded as assets for the payment of debts, if not already appropriated in that way.

This court held in the case of *Smith v. Gower*, 2 Duv. 17, that where the property and franchise of a railroad company had been sold under a mortgage, that the liabilities of the corporation still existed, and the corporation still lived, at least for the payment of its debts.

It is urged, however, that the appellant undertook to pay the current indebtedness incurred by the Paducah & Elizabethtown R. Co. in running its road, and that this embraced the tort complained of, or the liability of the company to the appellee under its implied contract to furnish safe machinery in operating the road. In the case of *Coggin v. Central R. Co.*, 62 Ga. 685, where the one company absorbed the former, one of the provisions of the act was that the living corporation should discharge all the contracts of the extinct corporation. There the court permitted the injured party to sue for a tort, and to recover on the agreement to pay all the debts; the reasoning being based upon some provision of the Code in which the word "debts" was used, the court saying that there was a strong probability that the record was intended to embrace liabilities of all classes, torts included. Whether the words, "to pay all current indebtedness in operating the road," embraces such a tort as is complained of in this case, is not necessary to be determined, as we think it evident that, before such a recovery could be had, some claim should be established against the party or corporation committing the injury. If we could construe the words "current indebtedness" as meaning what the appellee insists it does mean, we are not disposed to adjudge that an action for negligence, in which punitive as well as compensatory damages can be recovered, may be maintained against one not in existence when the tort was committed. This action should have been prosecuted against the Paducah & Elizabethtown R. Co. for the purpose of establishing the claim, and then the equity of the appellant, as against the stockholders of that corporation, or the claim of any against the present appellant, could be asserted.

The case of *Powell v. North Missouri R. Co.* was a case where several railroad companies were, by an act of the legislature, merged into one, and constituted one body, under the name of one of them. It was there held that where, by the terms of the deed, the first corporation was extinguished, and the second only continued to exist, the case was not one of consolidation or amalgamation. There the one corporation was authorized by a majority in interest of its stockholders to transfer its effects, assets, rights, and

privileges to the North Missouri R. Co., and upon such transfer the company was to cease to exist, and the road thenceforth to be styled the West Branch of the North Missouri R., their franchises to be completely vested in the North Missouri R. Co., etc. It was there said that the one corporation was absolutely extinguished; it was a matter of contract, and made upon a valuable consideration to a *bona fide* purchaser; and that, while a court of equity will not allow a corporation to give away its property to the prejudice of creditors, it will not follow the property into the hands of *bona fide* purchasers. 42 Mo. 68; *Eaton & H. R. Co. v. Hunt*, 20 Ind. 463.

In this case the appellee is proceeding on the theory that the Paducah & Elizabethtown R. Co. no longer exists; that its property and franchises have passed to the appellant by the deed filed with the petition. It has no interest in common with the appellant, nor has any of its stockholders any stock in the new company; and the fact that the president of the appellant was the owner of most of the stock in the Paducah & Elizabethtown road cannot have the effect of making a new and distinct corporation, that is a purchaser for value, liable for its debts, except as made so by the terms of the sale. We do not mean to adjudge that one corporation can be relieved of its liability by passing its property over to some other company, or that a creditor is deprived of his rights in such a case where the company liable to him consolidates with another. The right to consolidate cannot be prevented by the creditor, but he may, in such a case, have the assets applied by a court of equity to the payment of his debt, because, in effect, the corporation is dissolved.

The creditor, in the event the agreement of consolidation bound the consolidated company to pay the debts, could not be compelled to accept the agreement, and thereby destroy his right to look to his own debtor; and, as said in *Morawetz*: "It has sometimes been held that, when a new company is formed by consolidation of several companies, it thereby impliedly assumes the debts and obligations of the old. But this doctrine is not universally accepted, and there seems to be no sufficient reason for implying such an assumption of liabilities, particularly as creditors are not compelled to accept the same," etc. *Mor. Corp.* 558.

In the present case it is apparent that there was an absolute sale of the Paducah & Elizabethtown R., and the action should have been prosecuted to judgment against the latter company. The demurrer by the appellant should have been sustained. The judgment is therefore reversed and remanded, with directions to sustain the demurrer.

A sale or lease by one railroad of the roadbed, property, and franchise of another must be carefully distinguished from a consolidation of two or more distinct companies. By a consolidation a new artificial being is created,

distinct from either of its constituents. *A. & R. A. L. R. Co. v. State*, 1 Am. & Eng. R. R. Cas. 399. See also *Shields v. Ohio*, 95 U. S. 319; *Railroad v. Maine*, 96 U. S. 499. The new corporation exists and is created by an absorption of its constituent companies. The acquisition of this property and franchises gives it being, and as it succeeds to all the faculties and rights of its several components it must, as a necessary consequence, be subject to all the conditions and duties imposed by the law of their creation, except so far as it may be otherwise provided by the act under which such consolidation is effected. *Miss. Valley Co. v. Chicago, etc., R. Co.*, 58 Miss. 846; s. c., 8 Am. & Eng. R. R. Cas. 580; *C., R. I. & P. R. Co. v. Moffit*, 75 Ill. 528; *Hawkins v. Small*, 7 Bax. 193, s. c., 9 Am. & Eng. R. R. Cas. 432. As to effect of consolidation in exemptions from taxation, see *Cheraw v. Salisbury R. Co.*, 17 Am. & Eng. R. R. Cas. 431.

Hence in general a consolidated company is held to have assumed the liabilities of all the companies of which it is composed. *Miller v. Lancaster*, 5 Coldw. 513; *Columbus R. Co. v. Powell*, 40 Ind. 37; *Ind., Cin. & Lafayette R. Co. v. Jones*, 29 Ind. 465; *Northern Cent. R. Co. v. Drew*, 3 Woods, 391; *Powell v. Northern Mo. R. Co.*, 42 Mo. 63; *Pierce on Am. R. R. Law*, p 503; 1 Am. Rail. Cas. 91, notes.

The new company takes the property of the original companies subject to all liens upon it which were valid against them. It will not be heard to aver ignorance of any of the debts, contracts, or encumbrances of either of the companies by a merger of which it was formed. *Miss. Valley Co. v. Chicago, etc., R. Co.*, 8 Am. & Eng. R. R. Cas. 580.

Where two railroad companies consolidate, and the articles of consolidation provide that all contracts made by either company are assumed by the consolidated, and stock to be issued to persons entitled thereto in either company, a stockholder of one company which sells its roadbed to the other company has not a vendor's lien on the land so conveyed. *Cross v. Burlington & S. W. R. Co.*, 8 Am. & Eng. R. R. Cas. 263.

The consolidated company is in like manner liable for all torts of the companies of which it is composed prior to the consolidation. *Chicago, R. I. & P. R. Co. v. Moffit*, 75 Ill. 624; *Coggin v. Central R. Co.*, 62 Ga. 686; *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 397.

After the consolidation the old companies have no legal existence, and their liabilities can only be enforced against the consolidated company. *Ind. R. Co. v. Fryer*, 11 Am. & Eng. R. R. Co. 324. See also *Sappington v. Little Rock R.*, 11 Am. & Eng. R. R. Cas. 330; *McAlpine v. Southern Pac. R. Co.*, 20 Am. & Eng. R. R. Cas. 586.

Suits pending against a railroad company at the time of its consolidation do not abate, but may be continued against the consolidated company. *Balt. & Susq. R. Co. v. Musselman*, 2 Grant's Cas. (Pa.) 348. It is, however, error to take judgment in such case against the consolidated company without having first made it a party defendant. *Selma, Rome & Dalton R. Co. v. Harlin*, 40 Ga. 706. See also *Prouty v. Lake S. & Mich. S. R. Co.*, 52 N. Y. 363; *Chase v. Vanderbilt*, 62 N. Y. 307; *Ridgway v. Griswold*, 1 McCrary, 151. See further as to effects of consolidation, *Meyer v. Johnston and Stewart*, 8 Am. & Eng. R. R. Cas. 584 and note.

A mere lease or sale of one road by another does not affect the identity of the companies. *Central R. Co. v. Brinson*, 64 Ga. 475.

Therefore, it is well settled that a railroad company, with power to purchase the franchises and property of an older company, previously sold under a mortgage, as well as to construct and operate other lines of road, is not by virtue of such purchase an assignee of the older company, so as to be bound by any of its contracts except such as are a lien upon or otherwise bind the property and franchises thus purchased. *City of Menasha v. Milwaukee & North. R. Co.*, 52 Wis. 414; s. c., 5 Am. & Eng. R. R. Cas. 300.

See the *Houston & T. C. R. Co. v. Shirley*, 54 Tex. 125; s. c., 4 Am. & Eng. R. R. Cas. 448; *Branson v. Oregonian R. Co.*, 16 Am. & Eng. R. R. Cas. 517; *Lake Erie & W. R. Co.*, 17 Am. & Eng. R. R. Cas. 235.

Purchasers at Foreclosure Sale not Liable for Debts of Old Company.—It is, as a general rule, well settled that the purchasers of a railroad under a decree of foreclosure, who reorganize and form a new corporation, are not liable upon any of the debts, contracts, or obligations of the old company. *Vilas v. Milwaukee & Prairie du Chien R. Co.*, 17 Wis. 497; *Wright v. Milwaukee & St. Paul R. Co.*, 25 Wis. 46; *Gilman v. Sheboygan & Fond du Lac R. Co.*, 37 Wis. 317; *Smith v. Chicago & N. W. R. Co.*, 18 Wis. 17; *Stewart's Appeal*, 72 Pa. St. 291; *North Hudson R. Co. v. Booraem*, 28 N. J. Eq. 450; *Hopkins v. St. Paul & Pacific R. Co.*, 2 Dill. 306; *Secombe v. Milwaukee, etc., R. Co.*, 2 Dill. 469; *Sullivan v. Portland & Kennebec R. Co.*, 94 U. S. 806; *Menasha v. Milwaukee & Northern R. Co.*, 52 Wis. 514; s. c., 5 Am. & Eng. R. R. Cas. 800; *Cook v. Detroit, Grand Haven & Milwaukee R. Co.*, 43 Mich. 43; s. c., 9 Am. & Eng. R. R. Cas. 448; *Cooper v. Corbin*, 105 Ill. 224; s. c., 13 Am. & Eng. R. R. Cas. 395. But the debts incurred in the course of a receivership are often, by special order of the court, made a lien upon the property in the hands of purchasers at a foreclosure sale. Such an order is valid and binding. *Farmers' Loan & Trust Co. v. Central R. of Iowa*, 12 Am. & Eng. R. R. Cas. 461. See also *Farmers' L. & Co. v. C. R.*, 1 Am. & Eng. R. R. Cas. 630; *N. Y., etc., R. Co. v. Vatable*, 17 Am. & Eng. R. R. Cas. 268.

When, however, the old company has appropriated land for the purposes of its railroad, and a judgment has been rendered against it for the value of the land appropriated or condemned, which judgment is unpaid, if the new company enters upon and occupies such land it will be liable in equity for the payment of such judgment, upon the principle that it has adopted and ratified the original appropriation. *Lake Erie & W. R. Co.*, 17 Am. & Eng. R. R. Cas. 235.

Where the decree of foreclosure and sale recites that the sale shall be subject to the lien of receiver's certificates as prior and superior liens to the lien of the bonds issued under the mortgage, the purchaser cannot dispute the validity of the liens thus established even on the ground of fraud alleged to have been discovered after the confirmation of the master's report, fixing the amount of the liens. *Swan v. Wright's Ex'r*, 110 U. S. 590; s. c., 17 Am. & Eng. R. R. Cas. 845.

SEWELL

v.

CAPE MAY AND SEWELL'S POINT R. Co.

(*Advance Case, Court of Chancery, New Jersey. June 21, 1887.*)

The entire capital stock of the defendant company and more was expended in building and equipping its road, and an indebtedness for current expenses and taxes incurred. Bonds were issued, but the indebtedness had not been liquidated nor the interest on the bonds paid. A New Jersey statute declares that when a company shall become insolvent, or shall suspend its business for want of funds to carry on the same, a receiver may be appointed. Under these circumstances a bill was filed and a receiver appointed. Upon

a motion to dissolve and dismiss, *held*: 1. That the facts justified the conclusion that the company was insolvent within the meaning of the statute and authorized the appointment of a receiver; 2. That it is the duty of the court to get rid of a receiver at the earliest possible moment consistent with the interests of the creditors and stockholders, and that when the admitted liabilities and receiver's expenses are paid the receiver will be discharged.

BILL for an injunction and receiver. Motion to dissolve and dismiss. Denied.

F. F. Hogate and *S. H. Grey* for motion.

E. A. Armstrong contra.

BIRD, V.C.—On the return of the order to show cause, a receiver was appointed, with the consent of the present solicitor of the defendant. The defendant now answers and moves to dissolve the injunction and to dismiss the bill.

It is undisputed that the capital stock of the defendant company is \$39,000, which is all paid in; this was all expended in building FACTS. and equipping the road, and also \$2228.67 more. At the close of the year 1886, the company was indebted at least \$1100; of this sum \$400 was upon its promissory note, \$250 was a lumber bill, \$120 was a coal bill, \$68 was for exchange tickets, and \$150 was for taxes due the State.

After this indebtedness was created and the company had no money to pay with, it issued bonds to the amount of \$29,000 to the Camden Safe Deposit & Trust Co., the interest thereon to be paid semi-annually, and gave a mortgage on the road to secure the payment thereof.

The injunction was awarded, and the receiver appointed, because of the allegation and proof of the above-stated facts. The whole amount of indebtedness was indeed small; but the fact that a railroad company would allow a note of only \$400, a lumber bill of only \$250, a coal bill of only \$120, and a tax bill of only \$150, to stand unpaid for a long time after it had ceased operating its road for the season (it being a seaside, summer-resort road), had a very strong influence in leading the court to believe that the company was in very straitened circumstances, and led to the undoubted conclusion that it was then insolvent, in contemplation of law. The influence of this fact was not owing to the insignificance of the debts, but to the fact that (being so insignificant) they were not paid. And this reasoning is sustained by the answer, which says that the loan of \$29,000 was negotiated to raise money to pay off these liabilities in part. Nor can it be said that this loan improves the situation, for it is only exchanging one form of indebtedness for another; in doing which it brings to light the additional unfavorable circumstance that the first half-yearly instalment of interest on these bonds has been allowed to remain unpaid for several months after it became due.

I think the foregoing facts bring the case within the seventieth section of the act respecting corporations, Rev. 189, which declares that when a company shall become insolvent, or shall suspend its business for want of funds to carry on the same, a receiver may be appointed. And I also think that I am warranted in declaring that the defendant company is insolvent, under the rule laid down in *National Bank of the Metropolis v. Sprague*, 6 C. E. Green, 538, which declares: "Insolvency means a general inability of a debtor to answer pecuniary engagements; and it does not follow that he is not insolvent because he may ultimately have a surplus after winding up his affairs."

THE APPOINTMENT OF A RECEIVER JUSTIFIED.

I arrive at this conclusion without considering the allegation in the bill that the said loan of \$29,000 was and is only a pretence and without any consideration. This is denied in the answer, and the denial is accompanied by the allegation that "each and all of said bonds were issued and delivered by the officers of this defendant company to the purchasers thereof, for the full value and consideration in the said several bonds mentioned; and that full value and consideration was paid, and the same was received by this defendant company."

Now I cannot comprehend why, with all this money in the treasury, or any considerable part of it, these small debts were not paid long ago, long before this bill was filed; for the company must have had the money, since it is conceded that the first instalment of interest was due last November and has not yet been paid.

Taking into account all the circumstances, I think the order appointing the receiver should not be revoked. I think it is the duty of the court, made so by the statute, to take charge of the affairs of this company by a receiver.

But the court feels it to be a duty of equally high character to get rid of every such receiver at the earliest possible moment, consistent with the interests of creditors and stockholders.

And now, therefore, since the defendant company, by its answers, declares its ability to pay all of its obligations and to manage the affairs of the company successfully, I will further advise that if, at any time within thirty days after an order shall have been served upon the president, secretary, or treasurer it produces in court, upon five days' notice to the solicitor of the complainant, money sufficient to pay and discharge all the liabilities named in said bill and answer and not litigated, and except the principal of said bonds, and also all the other liabilities of said company which have accrued since the filing of said bill, including the interest on said bonds, and also all the reasonable costs and expenses of the said receiver, and his just commissions or compensation, and the costs of this suit, the said receiver shall be discharged and the said company remanded to the full care and possession of the road. And that the said defendant company may know the

WHEN THE RECEIVER WILL BE DISCHARGED.

amount of the costs and expenses of said receiver and also of the liabilities of said company which have come to the knowledge of said receiver, the said receiver will be required to file his account as receiver, and of all such matters, within five days after notice that he shall so do by the defendant company.

When Receiver will be Appointed.—See generally note to *U. S. Trust Co. v. N. Y. etc., R. Co.*, 25 Am. & Eng. R. R. Cas. 605; *Smith v. Port Dover, etc. R. Co.*, 25 Ib. 639; *In re Birmingham & L. J. R. Co.*, 3 Ib. 616; *Railway Co. v. Jewett*, 8 Ib. 702; *Brassey v. N. Y. etc., R. Co.*, 17 Ib. 285; *Dow v. Memphis, etc., R. Co.*, 17 Ib. 324; *Bigelow v. Union Freight R. Co.*, 20 Ib. 425.

The Power to Appoint.—The appointment of receivers originated in the court of chancery in England, and has naturally and regularly descended to all courts which have jurisdiction in equity. Beach on Receivers, § 8. It is inherent in courts of equity. *Folsom v. Evans*, 5 Minn. 418; *Skinner v. Maxwell*, 66 N. C. 45.

Under the *New York* code the appointment of receivers is included among the "provisional remedies" (N. Y. Code Civ. Proc. § 712), and it has been held that the provisional remedies are mere incidents to the general jurisdiction of the court, and not an essential part of such jurisdiction, and the legislature has carefully prescribed the cases in which a receiver may be appointed, and other provisional remedies granted, and by specifying the cases in which a receivership may be had, pending the action, and as a proceeding in the action have as carefully excluded every other case and prohibited the appointment except as authorized. *Fellows v. Heermans*, 13 Abb. Pr. (N. S.) 1.

The power to appoint receivers in mortgage cases was inherent in the court of chancery before the Code of 1848. It was continued by that code under subdivision 5 of section 244, and it is again reaffirmed by the general provision of section 4 of the Code of Civil Procedure, there being nothing to the contrary in that code. *Hollenbeck v. Daniell*, 94 N. Y. 342. In the recent case of *United States Trust Co. v. N. Y., W. S. & B. R. Co., re Russell*, 25 Eng. & Am. R. R. Cas. 601, it was said that the power of a court of equity to appoint a receiver *pendente lite* in foreclosure proceedings is inherent and not dependent upon statutory authorization.

It has been held in *North Carolina* that the code, which specified certain cases in which a receiver may be appointed, "does not materially alter the equitable jurisdiction" of the courts of that State. *Skinner v. Maxwell*, 66 N. C. 45; *Battle v. Davis*, 66 N. C. 252.

A court commissioner has no jurisdiction to appoint a receiver. *Quiggle v. Trumbo*, 56 Cal. 626.

In *Georgia* it has been decided that a judge *pro hac vice* has jurisdiction to try a case including an application for a receiver. *Landrum v. Chamberlin*, 73 Ga. 727.

In *Wisconsin* it has been held that a county court having no original jurisdiction of equitable actions may appoint a receiver, or employ other equitable remedies, in aid of a suit or a judgment at law; the code of that State having expressly adopted such modes of procedure as a part of the remedy in every civil action. *Second Ward Bank v. Upman*, 12 Wis. 499.

This power is rarely exercised by courts of appellate jurisdiction; and when it becomes necessary for such courts to appoint a receiver, in order to enforce their powers as courts of appeal, and for the due administration of justice, they must have jurisdiction of the suit by appeal and of the person against whom the remedy is sought. *Kerr v. White*, 7 Baxter (Tenn.), 394;

Allen v. Harris, 4 Lea (Tenn.), 190; *West v. Weaver*, 3 Heisk. (Tenn.) 589. See also *Pacific R. of Mo. v. Ketchum*, 95 U. S. 1.

As between courts of the same State, the court which first appoints a receiver has the sole disposition of the funds or property received by him as such, and is bound in the exercise of its judicial powers to make administration of it. *Beach on Receivers*, § 15; *Stearns v. Stearns*, 16 Miss. 167; *O'Mahony v. Belmont*, 37 N. Y. Super. Ct. 380; *McCarthy v. Peake*, 18 How. Pr.; s. c., 9 Abb. Pr. 164; *Pugh v. Brown*, 19 Ohio, 202, 211.

"Not till the proceedings in the first suit have so resulted that the property is no longer in the possession of the court through its receiver, can any other court or parties interfere with it." Redress must be sought in the court which appointed the receiver. *Young v. Montgomery & E. R. Co.*, 2 Woods (U. S.) 606. See also *U. S. Trust Co. v. N. Y., W. S. & B. R. Co.*, 67 How. Pr. 390.

While the property is in the possession of a court, either actually or constructively, that court is bound to protect its possession from the process of other courts. *Buck v. Colbath*, 3 Wall. (U. S.) 334, 342. *Andrews v. Smith*, 19 Blatchf. (U. S.) 100; *The Holliday Case*, 27 Fed. Rep. 830, 843.

It has been held that the actual taking possession by a receiver is not necessary to invest a court having cognizance of the subject-matter with exclusive control, but such control is recognized in a court of competent jurisdiction from the time it first takes cognizance of the controversy. *Union Trust Co. v. The Rockford, Rock Island & St. Louis R. Co.*, 6 Biss. C. C. 197. But see *Merchants & Planters' Nat. Bank v. Trustees of Masonic Hall*, 63 Ga. 549. The prior jurisdiction acquired by the pendency of a former action in which an injunction and receivership are sought, will exclude the interference of the court in another suit of which the principal object is the same provisional remedies. *Young v. Rollins*, 85 N. Car. 485; 12 Am. & Eng. R. R. Cas. 458.

It is well settled that receivers appointed in one jurisdiction are not entitled as of right to recognition in other jurisdictions. *Booth v. Clark*, 17 How. (U. S.) 322; *Atkins v. Wabash, St. L. & P. R. Co.*, 29 Fed. Rep. 161; *People v. Central City Bank*, 53 Barb. 412; *Hunt v. Columbian Ins. Co.*, 55 Me. 290; *Willetts v. Waite*, 25 N. Y. 577; *Taylor v. Columbian Ins. Co.*, 14 Allen, 353; 2 Kent's Com. (13th ed.) 406, and cases cited; *Story's Conflict of Laws*, § 419 *et seq.*

Under principles of comity, however, a receiver appointed by the court of another State will be allowed to assert his claim when his right does not conflict with the interests of citizens of the State where the suit is brought. *Bank v. McLeod*, 380 Ohio St. 174; *South Car. R. Co. v. People's Sav. Inst.*, 64 Ga. 18; *Hoyt v. Thompson*, 5 N. Y. 320; *Williams v. Hintermeister*, 26 Fed. Rep. 889.

Where the same person has been appointed receiver of a railroad operating its road within several States, by two United States district courts, and a difference arises under the order of the two courts as to a mere matter of administration and procedure, and not as to any substantial rights of the parties, the circuit judge will not interfere or modify such orders. *Central Trust Co. v. Texas & St. L. R.*, 17 Am. & Eng. R. R. Cas. 334.

Grounds for Appointment—How far Discretionary.—In the appointment of a receiver the court acts only upon a proper case being made out for the exercise of its jurisdiction, according to well-established principles, and in that sense only can a receiver be said to be *ex debito justitiæ*, whether the application be interlocutory or made at the hearing, whether the appointment of the receiver is the sole object of the action or only incidental to other relief, and whether the relief is sought at the instance of a judgment creditor or any one else. *Smith v. Port Dover & L. H. R. Co.*, 25 Am. & Eng. R. R. Cas. 639; s. c., 12 Ont. App. 288. See *Farmers' L. & T. Co. v. Chi-*

cago & Atl. R. Co., 24 Am. & Eng. R. R. Cas. 166. It may be laid down as an admitted principle that where the court cannot interpose usefully it should not interfere at all, and it should interfere only so far as it can interfere usefully. *Simpson v. Ottawa & Prescott R. Co.*, 1 Ch. Chamb. R. 126.

There is no case in which the court appoints a receiver merely because the measure can do no harm. *Orphan Asylum Soc. v. McCartee*, 1 Hopkins (N. Y.) Ch. 426; *Blendheim v. Moore*, 11 Md. 365. Under this principle a receiver will not be appointed at the suit of a judgment creditor of a leased road, where the whole surplus earnings of the road were made applicable by the statute, and were being applied, by the lessee, towards reducing the incumbrances, the interest upon which they were insufficient to pay. "Because there is no reason to suppose that there is anything to receive in which the plaintiff can be interested. . . . the only way in which the plaintiff expects the appointment of a receiver to be useful to him was that the defendants would possibly pay his claim rather than submit to interference with their arrangements." *Smith v. Port Dover & Lake Huron R. Co.*, 12 Ont. App. 288; s. c., 25 Am. & Eng. R. R. Cas. 689. Upon an interlocutory application for the appointment of a receiver of land held subject to a mortgage, the legal estate being outstanding in the mortgagee, and the judgment creditor unable to obtain possession under the ordinary writ of *elegit*, Jessel, M.R., said: "In dealing with such an application the first point to be considered was whether there was an undisputed judgment. . . . The next point was, has the defendant sold the land? . . . The third point was, is the interest of the debtor in the land such that it cannot be reached by law? . . . If that was answered in the affirmative it seems to me that the order should be of course." *Anglo-Italian Bank v. Davies*, L. R. 9 Ch. D. 282. See also *Hopkins v. Worcester & Birmingham Canal Proprietors*, L. R. 6 Eq. 477.

"The rule in equity in regard to the appointing a receiver of mortgaged property is that it will be granted in all cases where the income of the estate is required to meet the incumbrance, and is at the present time being so applied as not to be legally applicable to reduce the incumbrance." 2 Redfield on Railways, 363. Under such circumstances a receiver will be appointed during the pendency of a bill filed by the mortgagee to be put in possession of the mortgaged property. *Dow v. Memphis & L. R. Co.*, 17 Am. & Eng. R. R. Cas. 324. As against a prior mortgagee or incumbrancer in possession a receiver will not, as a general rule, be appointed. *Kerr*, 34; *Daniell*, 1665, 1666.

If a default is imminent and manifest, and the corporation is in peril of breaking up and destruction of its business, a receiver may be appointed in the sound discretion of the court, even though no default has actually been made by the corporation in its obligations to the petitioner. *Brass v. N. Y. & N. E. R. Co.*, 17 Am. & Eng. R. R. Cas. 285. The fact that certain of the bondholders are in possession, to the exclusion of others, is sufficient reason for the appointment of a receiver, unless the interval between the decree and the sale is very brief. *Benedict v. St. Joseph & W. R. Co.*, 14 Am. & Eng. R. R. Cas. 609.

In order to have a receiver appointed, it is essential that the defendant corporation have something to be received. Hence when the sole assets of a corporation in respect to which a decree could be made consisted of a claim for damages against another corporation, which claim was held to be untenable, a bill for the appointment of a receiver will be dismissed. *Bigelow v. Union Freight R. Co.*, 20 Am. & Eng. R. R. Cas. 425; s. c., 137 Mass. 478. To the same principle may be referred *In re Birmingham, etc., R. Co.*, 18 Chan. D. 155, s. c., 3 Am. & Eng. Corp. Cas. 616, in which it was held, that a railway company which has never commenced to acquire the lands or construct the railways authorized by this act is not an "undertaking" within

the meaning of sect. 4 of the Railway Companies Act, 1867, of which a receiver can be appointed under that section.

Whenever the judgment creditor of a railway company is unpaid, the appointment of a receiver or manager under this section is a matter of right. *In re Manchester & Milford R. Co.*, L. R. 14 Ch. Div. 645. For a good illustration of the principle see *St. Louis, K. C. & C. R. Co. v. Dewees*, 28 Fed. Rep. 519, in which it was *held* that where the title to an unused railroad track is in dispute, and both parties to the controversy claim possession, and neither is in actual physical possession, a court of equity will not interfere in a suit to quiet title by appointing a receiver, even where the defendant has attempted to take forcible possession, until the right to possession is established at law.

A receiver will not be appointed on the ground that part of the stockholders participating in a corporate meeting had been prohibited from so doing by injunction. Nor will a receiver be appointed without notice to the defendant—unless the delay required to give such notice would result in irreparable loss. *Railway Co. v. Jewett*, 8 Am. & Eng. R. R. Cas. 702; s. c., 37 Ohio St. 649.

When a corporation has become extinct by legislative enactment, and its powers and property transferred to a new corporation substituted for it, the courts have no power on an *ex parte* application to appoint a receiver of the assets of the defunct corporation; such order cannot properly be made except in a proceeding to which its successor or substitute is a party. *Young v. Rollins*, 85 N. Car. 485; s. c., 12 Am. & Eng. R. R. Cas. 455.

A receiver cannot be appointed *ex parte* in a proceeding by creditors to wind up an insolvent corporation, and pending the decision on a demurrer whereby the right to file the bill is put in issue. *Cook v. Detroit & Milwaukee R. Co.*, 12 Am. & Eng. R. R. Cas. 459; s. c., 45 Mich. 453.

Courts of equity are exceedingly unwilling to appoint a receiver on an *ex parte* application, and will do so only in case of urgent necessity. *Bisson v. Curry*, 35 Iowa, 72; *Blondheim v. Moore*, 11 Md. 365; *Triebert v. Burgess*, 11 Md. 452; *Vohsell v. Henson*, 26 Md. 83; *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438; *Sandford v. Sinclair*, 8 Paige, 373; *People v. Albany & S. R. Co.*, 7 Abb. Pr. N. S. 265; *Whitehead v. Worten*, 43 Miss. 523; *Rogers v. Dougherty*, 20 Ga. 271; *Devoe v. Ithaca & Oswego R. Co.*, 5 Paige, 521; *Maynard v. Reilly*, 2 Nev. 213; *McLean v. Lafayette Bank*, 3 McLean, 508.

Allegations in a bill that the company is insolvent, and has suspended its business for want of funds to carry on the same, are not sufficient in a bill to have a corporation declared insolvent and a receiver appointed. The facts and circumstances must be set out from which the insolvency shall appear. *Newfoundland R. Const. Co. v. Shack*, 40 N. J. Eq. 222.

Where pending an action to subject a railroad to sale for the payment of its mortgage debts, the president and directors are ordered by the court to continue in the possession of the property of the road and to carry on its business subject to the court's control, the president and directors and their successors in office are thereby constituted receivers of the court. *Gibbes v. Greenville & Columbia R. Co.*, 15 Shand's Rep. (S. Car.) 518, 304; s. c., 9 Am. & Eng. R. R. Cas. 713, 739.

Discharge of Receiver.—A court of equity will not conduct the business of a corporation through a receiver unless the interest of creditors unmistakably requires it; and when a railroad company, by collusion with a creditor who prays for the appointment of a receiver, allows its property to go into a receiver's hands, not for the purpose of meeting its obligations to the petitioning creditor, but for the purpose of keeping its property from other creditors, the court which appointed the receiver will, upon information of the facts, discharge him of its own motion. *Sage v. Memphis & L. R. Co.*, 17 Am. & Eng. R. R. Cas. 359. In the absence of such collusion in the ap-

pointment; a receivership continues as long as the court may think it necessary to the performance of the duties pertaining thereto. *Young v. Rollins*, 90 N. Car. 125; a. c., 25 Am. & Eng. R. R. Cas. 646.

The appointment of a receiver is a temporary measure: "The court does not assume the management of a business or undertaking except with a view to the winding-up and sale of the business and undertaking. The management is an interim management; its necessity and justification spring out of the jurisdiction to liquidate and to sell; the business or undertaking is managed and continued in order that it may be sold as a going concern, and with the sale the management ends." Lord Cairns in *Gardner v. London, Chatham & Dover R. Co.*, L. R. 2 Ch. App. 212. See also *Gilbert v. Washington R. Co.*, 1 Am. & Eng. R. R. Cas. 473; *Taylor v. Phila. & Reading R. Co.*, 3 Am. & Eng. R. R. Cas. 177 and note.

As a general rule, the court to which an application for an order of discharge must be made is the court of which the receiver is an officer. A modification of this doctrine has grown up in the American practice, out of the power of removal exercised by the United States courts. Thus, where in an action pending in a State court a receiver has been appointed, and then before any motion to discharge has been made the case is removed into the United States court, the motion for the discharge may be made in that court at any time after the record is filed. *Texas & St. Louis R. Co. v. Rust*, 17 Fed. Rep. 275; *Dillon on Removals*, § 80, p. 99; *Mahanoy Mining Co. v. Bennett*, 4 Sawyer, 289.

In *California* it has been held that a failure to serve a notice of motion for a discharge of the receiver is an irregularity not affecting the merits of the motion, and will not justify the reversal upon appeal of an order discharging the receiver. *Coburn v. Ames*, 57 Cal. 201. As to the effect of statutory requirement of notice, see *Beach on Receivers*, §§ 777-779.

Under the English practice the receiver is not entitled to a hearing on a motion for his discharge, as he is an officer of the court and not interested in the appointment, except to carry out the duties of the office in an impartial manner. *Herman v. Dunbar*, 23 Beav. 312.

A plaintiff who has procured the appointment of a receiver cannot dismiss his bill and have the receiver discharged without first requiring him to pass his accounts. *White v. Lord Westmeath*, 2 Hog. 33.

The trusteeship of a receiver ends upon his discharge and the payment or delivery over by him of the property in his hands, pursuant to this order of the court appointing him. *Hovey v. Elliott*, 53 N. Y. Super. Ct. 331.

The general ground upon which an application for the discharge of a receiver is based must always be the satisfaction of the plaintiff's claim. *Beach on Receivers*, § 793.

The payment of the judgment, and its satisfaction of record after the appointment of a receiver in supplementary proceedings, do not, however, *ipso facto* operate to discharge the receiver, but the debtor may obtain an order of discharge upon payment of his lawful charges. *Cook v. Findley*, 60 How. Pr. 375. In such case the granting of the order of discharge is not a matter of discretion, but its refusal is error which may be reversed on appeal. *Milwaukee & Minn. R. Co. v. Soutter*, 2 Wall. 510.

EARLY

v.

LAKE SHORE AND MICHIGAN SOUTHERN R. Co.

(*Advance Case, Michigan. June 16, 1886.*)

A turntable belonging to the defendant railroad company was located upon its depot grounds, six feet from the line of a street passing through a sparsely settled portion of the city, and very little travelled. It had stood upon its present location for about fifteen years, and constituted in itself a conspicuous object of warning of whatever danger it presented. The plaintiff while attempting to pass along the street on a dark night fell into it and sustained serious injury. It was shown that the plaintiff knew of its location from the time it was built. He had worked for the company eighteen years, and fourteen years of that time was a night watchman. He knew all about the danger in passing, if there was any. There was no statute requiring the company to fence its depot grounds. *Held*, that the plaintiff could not recover; negligence will not be presumed from the bare fact of the occurrence of the accident on the defendant's land; and evidence of other and previous accidents occurring at the same place was inadmissible.

ERROR to the branch circuit court to review a judgment against the plaintiff in an action for injury resulting from negligence. Affirmed.

The facts are stated in the opinion.

F. L. Skeels and *H. H. Barlow* for plaintiff, appellant.

Weaver & Weaver, George C. Greene, and O. G. Getzen-Danner for defendant, appellee.

SHERWOOD, J.—The defendant has a turntable at Coldwater in its yards. On the night of the 8th of November, 1883, the plaintiff fell into it, and received the injuries of which he complains in this suit. He alleges as grounds for recovery, that the defendant kept its turntable in close proximity to the street, and carelessly and negligently allowed the same to remain uncovered and unfenced, and in consequence of which the plaintiff in passing the same in a dark night missed his way and fell into the excavation made for the table. The cause was tried at the branch circuit and Judge Pealer directed the verdict for the defendant. FACTS.

The record is a very brief one, still it purports to give all the evidence in the case. Clay street runs north and south through the city of Coldwater. On the evening of the accident the defendant had been attending a party at Mr. Grosee's, east of Clay street, and was returning home when he met with his injury.

It was then about 12 o'clock and the night was very dark and stormy. Clay street passes through the defendant's depot grounds,

and the turntable was located therein and about 6 feet from the west side of the street. Along this street, upon that side, there is no sidewalk but a well-beaten path, several feet wide, which was used by persons passing along the street. The testimony further shows that the turntable has been used where it now is about fifteen years, and that the plaintiff knew of its location from the time it was built; that he worked for the company eighteen years, and fourteen years of that time was night watchman, and knew all about the danger in passing, if there was any. The testimony tends to show that Clay street runs through a sparsely settled portion of the city, and is not very much travelled. There is testimony showing that the plaintiff, during the evening at the party, indulged in the use of several glasses of beer, but it does not appear that it in any respect disabled him from finding the way to his home, or influenced his action.

There is no question in this case but the defendant had a right to the use of land at the turntable to the line of Clay street, and that there is no statute requiring it to fence the street or its grounds at this point. The convenience and necessities of the company, as well as that of the public doing business with the road, require that depot grounds shall remain open and easy of access; and, unless ordinary care for protection to persons requires that the turntable should have been fenced along Clay street, the plaintiff failed to make out a case. This turntable was located near the other buildings of the company, and near its tracks at this point. The table itself was a conspicuous object of warning of whatever dangers it presented, and no one was more familiar with them, it would appear, than the plaintiff himself. It was 30 feet distant from the centre of Clay street, and about 6 feet from its west side. It was 40 feet in diameter and 4 feet deep. But, with all the knowledge the plaintiff had of the premises and its dangers, it appears by the record that he not only left the footpath, so well defined, but also the street, and went over on the defendant's depot grounds for a distance of 6 feet, and then fell into the excavation. It would seem that more care than is shown under the facts and circumstances above stated should have been observed upon the part of the plaintiff.

The plaintiff, however, claims that only the negligence on the part of the defendant should be considered, under the direction of the circuit judge given to the jury. We are not able to discover any negligence on the part of the company in placing the turntable where it did, or in the manner it guarded and used it, upon the undisputed facts. We do not think the defendant constructed the turntable so nearly contiguous to the street as to make it dangerous to travellers thereon; nor do we regard the distance from the street such that travellers, in the "ordinary aberrations or casualties of travel, may stray or

COMPANY NOT
NEGLIGENT.

be driven over the line and injured" by falling into the excavation. *Hardcastle v. South Yorkshire R. Co.*, 4 Hurlst. & N. 67; *Howland v. Vincent*, 10 Met. 371; *Sweeny v. Old Colony & N. R. Co.*, 10 Allen, 368; *Beek v. Carter*, 68 N. Y. 283; *McAlpin v. Powell*, 70 N. Y. 126; *Morgan v. Hallowell*, 57 Me. 377; *Pittsburg, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364; *Omaha & R. V. R. Co. v. Martin*, 14 Neb. 295; *Hargreaves v. Deacon*, 25 Mich. 1.

The fact that the plaintiff was injured at the turntable excavation is not proof that defendant was negligent in maintaining it in the manner it did. Negligence must be founded on competent evidence, and will not be presumed from the bare fact of the occurrence of the accident on the defendant's land. *Gramlich v. Wurst*, 86 Pa. 74.

The court committed no error in excluding evidence of other and previous accidents at the same place. There was no testimony tending to show any negligence on the part of the defendant, and the instruction of the court to the jury was correct.

The judgment must be affirmed.

CAMPBELL, CH.J., and CHAMPLIN, J., concurred.

MORSE, J., dissenting:—In this case the facts show without dispute that the turntable was only $5\frac{1}{2}$ feet from the west line of a travelled street. There was no sidewalk upon the west side of the street, but there was a well-developed and well-used footpath, which answered the same purpose as a sidewalk for foot-passengers.

The night was very dark and stormy, a night wherein it is most difficult to exactly keep the road. The plaintiff offered to show that people upon dark nights frequently fell into this unfenced and unprotected hole.

No person, no railroad corporation, is justified in making near a public road an excavation of this kind—a hole so near the highway "that travellers in the ordinary aberrations or casualties of travel may stray or be driven over the line, and be injured by falling into the excavation." Whart. Neg. § 349.

This hole was so near that one stumbling would by his own length in falling go into it. *Hardcastle v. South Yorkshire R. & R. D. Co.*, 4 Hurlst. & N. 67; *Barnes v. Ward*, 9 C. B. 392; *Hadley v. Taylor*, L. R. 1 C. P. 53; *Cooley*, Torts, 660; *Wood Nuis.* § 271; *Add. Torts*, § 222.

This turntable was a death-trap to passers-by upon the street on a dark night, and in my opinion the case should have been submitted to the jury. The defendant, under the proofs, was negligent as a matter of law, and the negligence of the plaintiff was a question of fact.

Injuries on Turntables.—See *Evansich v. G. C. & S. R. Co.*, 6 Am. & Eng. R. R. Cas. 182; *Nagel v. Mo. Pac. R. Co.*, 10 Ib. 702; *Fitts v. Cream City*

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R. Co., 15 Ib. 462; Kolsti v. Minneapolis, etc., R. Co., 19 Ib. 140; Guefete, etc., R. Co. v. Styron, 1 S. W. Rep. 161; a. c., 25 Am. & Eng. R. R. Cas. 543, note.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. CO.

v.

FAIRBAIRN.

(*Advance Case, Arkansas. March 19, 1887.*)

An Arkansas statute requires the railroad companies in that State to post at the nearest station-house a notice of the killing of stock by their trains. A certain person was missing a cow, and being unable to read, took the plaintiff with him upon the depot platform to read for him what notices were there posted. The plaintiff, in climbing up to get at the notice, fell through a defective plank in the platform and was injured. *Held*: 1. That a railroad company is bound to use ordinary care to keep the platforms at its various station-houses in good repair and in good condition for those who have the legal right to go upon them, and that it was liable to the plaintiff. 2. The fact that it was about dark when the plaintiff went upon the platform cannot, as a conclusion of law, be declared *per se* negligent.

APPEAL from circuit court, Clark county.

Dodge & Johnson for appellant.

Crawford & Crawford for appellee.

COCKRILL, C.J.—The appellee was injured by stepping into a cavity caused by a rotten plank in the appellant's platform at Bierne station. The jury found the issues in his favor, and the question whether the appellee was lawfully upon the platform at the time he was injured is the only one properly left for our consideration. If he was there merely from curiosity, or for his own convenience, or for the transaction of business in no way connected with the railroad company, no relation existed between him and the company which imposed upon the latter the duty of exercising even ordinary care in maintaining a safe platform for his use, and it is not liable for his injury. *Thomp. Carr.* p. 105, § 2; *Pittsburg, Ft. W. & C. R. v. Bingham*, 29 Ohio St. 364; *Gillis v. Pennsylvania R.*, 59 Pa. St. 129; *Kansas City R. v. Kirksey*, 3 S. W. Rep. 190. But the company is bound to use ordinary care to keep its platform in a safe condition for the benefit of those who have the legal right to go upon them. The public duties and obligations of a railroad confer upon the public the right to enter upon its premises for the purpose of making such obligations available. There is an implied promise on the part of the company that these obligations will be discharged,

DUTY OF COMPANY TO KEEP PLATFORM SAFE.

and this promise is an inducement—an invitation—to those who may wish to derive a benefit therefrom to enter upon the premises for the purpose; and when they do so, the company owes them the duty of having its premises in such condition that a person, in the exercise of ordinary care, can transact his business without injury.

In fixing the railways' obligations, the statute requires that they shall post upon the nearest station-house a notice of the killing of stock by their trains, and imposes a penalty to be recovered by the owner for its non-observance. This is for the benefit of the stock-owner. If his cow is missing, and he is informed that an animal has been killed upon the railroad track, he can get a description of it, with the time and place of the killing, from the notice the company is required to post, and is thus facilitated in making his claim for compensation. It is necessary that he should go upon the platform at the station for this purpose, and he has therefore the legal right to do so. Without this right, the notice would be useless, and would not have been required.

PLAINTIFF WAS
LAWFULLY ON
PLATFORM.

In the case before us, a cow had been killed on the appellant's track. The owner was apprised of the fact, and desired to examine the notice, which he knew was posted at the station, in order to get more accurate information. He was illiterate, and unable to read. He procured the plaintiff to go with him and read the notice for him. The notice was posted on the wall of the station-house, and the plaintiff was compelled to mount a box to read it. When he stepped off the box, his foot went through a hole in a decayed plank in the platform, and he was injured. If the stock-owner had been injured, while properly exercising his right to examine the notice, through the want of ordinary care on the company's part, we think it clear that he could recover. He was there through the inducement or upon the invitation of the company, implied from posting the notice for his information, and was entitled to safe access to his place of business. 2 Wood Ry. Law, § 310; Carleton v. Franconia I. & S. Co., 99 Mass. 216. This right of protection extends to all persons "who have rightful occasion to use" the platforms, as was said by Appleton, C.J., in Tobin v. R. Co., 59 Me. 183. This was the case of a hackman engaged in carrying passengers to the railroad depot. See, too, Wendell v. Baxter, 12 Gray, 494. No distinction can be drawn between the plaintiff and the stock-owner in the right to go upon the platform to examine the notice. What the latter had the right to do himself, he had the power to authorize another to do for him. An employee who goes upon a company's premises to receive his master's freight enjoys the same right of protection that the master does (Toledo W. & W. R. Co. v. Grush, 67 Ill. 262), and for the same reason that the plaintiff here should be protected, viz., be-

cause he is clothed with his principal's right to enter the premises to transact his business; and the rule applies to one who goes upon the company's premises to aid a friend who is to depart or arrive by its trains. *Gillis v. Pennsylvania R., supra; McKone v. Michigan Cent. R., 51 Mich. 601; s. c., 17 N. W. Rep. 74.*

But it is said the plaintiff was guilty of contributory negligence in entering upon the platform at the hour selected. It was dusk—neither daylight nor dark. We cannot declare, as a conclusion of law, that this *per se* was negligence. The question was fairly submitted to the jury, under proper instructions, to determine whether the plaintiff's conduct contributed to his injury, and they have resolved the question in his favor. The charge was as favorable to the company as it could demand, and the facts proved were sufficient to warrant the jury in finding that the plaintiff was free from negligence, and that the defendant was not.

Affirmed.

See next case and note.

SULLIVAN

v

VICKSBURG, SHREVEPORT AND PACIFIC R. Co.

(*Advance Case, Louisiana. June 18, 1887.*)

Plaintiff, walking on an elevated plank walk constructed alongside of its track at a station by defendant, for the use of passengers and the public, heard a train approaching behind him, and moved to the middle of the walk, where he would have been safe from being struck by any passing car of the ordinary width. The approaching train, however, was a construction train of peculiar build, having its brakes attached to the side of the cars instead of at the ends, and thus causing the brake-wheels to project some 14 inches beyond the edge of the car. This wheel being the height of plaintiff's head, struck him as the train passed, and knocked him senseless, inflicting severe injuries. *Held*, that plaintiff had the right to be on the walk, and to suppose himself in safety while occupying it at a point beyond the projection of all ordinary trains, and that he was guilty of no negligence.

Held, that defendant's employee seeing him there, and knowing the extraordinary projection of his brakes, was bound to recognize his danger, and guard against it, and hence was guilty of negligence.

The court is averse to increasing the verdicts of juries, who rarely underestimate damages; but when the jury has failed to do justice, the court, in the exercise of its jurisdiction, must do it. The verdict in this case is manifestly insufficient, and is increased from one to six hundred dollars.

APPEAL from district court, Ouachita parish.

Boatner & Boatner for plaintiff and appellant.

F. P. Stubbs for defendant and appellee.

FENNER, J.—At Waverly station the defendant company's main track is situated at some distance from its depot building, and between the two runs a side-track. Between the two tracks defendant had constructed a plank walk or platform slightly elevated above the tracks, and running for some distance beyond the depot front. Its object was to furnish a convenient landing-place for passengers getting on or off its cars. It consisted of three parallel planks, and was from three to four feet wide. Between the edge of the walk and the main track there was a space of between 12 and 18 inches; and, inasmuch as an ordinary box or passenger car projects over the track about 22 to 24 inches, it follows that it would, in passing, project about six to eight inches over the walk. Like conditions existed with reference to the side-track.

On December 31 plaintiff had gone to the station to meet some families of laborers who arrived on the passenger-train. Shortly afterwards he observed that some children of the party were on the main track, and, noticing that another train was approaching, he walked up this plank walk to make them get off the track. After doing so, he proceeded on the same walk towards the wagons which were to receive the laborers, going in the same direction in which the approaching train was coming, and with his back towards it. As it neared him, he moved from the edge to the middle of the walk, and then, considering himself in safety, paid no more attention to it. Any ordinary car would have passed without touching him, but it chanced that this was a construction train running with its engine in the rear, and composed of flat cars for loading and unloading dirt, with a centre-piece down their middles as a guide for an unloading plough which passed along the whole train, propelled by a wire rope attached to the locomotive. This arrangement necessitated the placing of the brakes on the side, instead of at the ends, of the several cars, as is usual. Hence the wheels of the brakes projected some 14 inches beyond the edge of the car, and, being about the height of plaintiff's ear, the wheel struck him as the cars passed, inflicting the injuries for which the present suit in damages is brought.

We think the defendant is clearly liable. The plank walk was built for the accommodation of passengers and the public, and the latter were invited to use it. Plaintiff was properly on the walk, and had the right to suppose that he was in safety there. Conceding that his eye might have informed him that the edge of the walk was too near the track to permit the passage of cars of ordinary width without projecting over it, yet he availed himself of this information, and occupied the middle plank, where he would have been safe from any ordinary train. It happened that there were some stationary box-cars on the side-track which projected over the opposite edge of the walk; and, if

PLAINTIFF EN-
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he had tried, he could not have moved much further away, though, if he had moved a little further, he would have escaped, as his companion did. Still, in occupying the middle plank, he passed beyond the reach of any ordinary car, and certainly had the right to suppose himself in absolute safety, as he would have been but for this unusual system of brakes. There is some evidence to show that the brake which struck him was bent outward, though this is not uncontradicted. The engineer saw him, and, knowing the projection of the brakes and the situation of the platform, should have recognized and guarded against the danger. Plaintiff was guilty of no negligence. He did not know, and was not bound to know, the existence of these unusually projecting brakes. He had a right to suppose that he was safe, at least in the middle of that walk, and in taking that position common experience and reasonable foresight assured him that, under all ordinary conditions, he ran no risk. The injury, therefore, was not an ordinary and natural sequence of his act, but was the result of extraordinary conditions brought about by the acts of defendant and which plaintiff could not have foreseen and had no reason to anticipate. *Summers v. Railroad*, 34 La. Ann. 144.

In the case just quoted, the nature and characteristics of juridical negligence are fully discussed. The conduct of defendant falls precisely under the principle there approved, as laid down by the supreme court of Pennsylvania. "When we are engaged in an act which the surrounding circumstances indicate may be dangerous to others, and when the event whose occurrence is necessary to make our act injurious is one which we can readily see may occur under the circumstances, and unite with the act to commit the injury, we are culpable if we do not take all the care which prudent circumspection would suggest to avoid the injury." *Fairbanks v. Kerr*, 70 Pa. St. 86.

The jury which tried the case below appreciated the facts as we have done, so far as defendant's liability is concerned, and gave a verdict for plaintiff for \$100. Plaintiff is the appellant, and demands an increase of the allowance. He is clearly entitled to it. With all our indisposition to increase verdicts for damages rendered by juries, who rarely underestimate them, yet it is a matter within our jurisdiction, upon which we are in duty bound to pass, and we must do justice when clearly satisfied that the jury has failed to do it. Hence, in proper cases we have extended such relief. *Scheen v. Poland*, 34 La. Ann. 1107; *Decoux v. Lieux*, 33 La. Ann. 397; *Richardson v. Zuntz*, 26 La. Ann. 313; 2 Sedg. Dam. 661, and cases there cited. In this case plaintiff was knocked senseless, his ear was cut in two, he received a severe gash on his head, his face was mashed and bruised, and his leg severely sprained. After recovering consciousness, he was seized with vomiting, which continued for several

INCREASING
DAMAGES.

hours. He was laid up for several days, suffering great pain, and incurring expenses for board and medical treatment, and did not fully recover for some weeks. It is absurd to consider this verdict of \$100 as affording reparation for such injuries. Indeed, it would scantily compensate the trouble and expense of the lawsuit which he was compelled to bring in order to vindicate his rights. We think an addition of \$500 to the verdict will mete out only moderate justice.

It is therefore ordered, adjudged, and decreed that the verdict and judgment appealed from be amended by increasing the principal sum from one hundred to six hundred dollars, and that, as thus amended, the same be now affirmed; defendant to pay costs of appeal.

Liability of Company for Injuries Caused by Defective Station Appointments.—It is the duty of a railway company to provide reasonable accommodations at their stations for passengers who have occasion to travel on their roads; to keep in safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, as well as all portions of their station grounds reasonably near to the platforms, where those who have purchased tickets with a view to take passage on their cars would naturally or ordinarily go. *Stewart v. Int. & G. N. R. Co.*, 2 Am. & Eng. R. R. Cas. 497. See also *Bullard v. B. & M. R. Co.*, 27 Am. & Eng. R. R. Cas. 117; *B. & O. R. Co. v. Rose*, 27 Am. & Eng. R. R. Cas. 128.

A railroad company is liable for injuries caused by unfenced holes or pits in station grounds or a cavity in platform. *Burgess v. R. Co.*, 95 Eng. Com. Law, 923; *Tobin v. Portland, etc., R. Co.*, 59 Me. 183; *Louisville, etc., R. Co. v. Wolfe*, 5 Am. & Eng. R. R. Cas. 625.

The platform must be of sufficient length to afford safe egress from an ordinary train. *St. Louis, etc., R. Co. v. Cantrell*, 8 Am. & Eng. R. R. Cas. 198; and must not extend so far towards track that passing cars will project over it. *Dobiecki v. Sharp*, 88 N. Y. 202; s. c., 8 Am. & Eng. R. R. Cas. 485; *Langan v. St. Louis, etc., R. Co.* 3 Am. & Eng. R. R. Cas. 355.

It is gross negligence for the company so to construct a platform between tracks that when the trains stand side by side there is only 2 feet 2 inches clear space between them. *Chicago & Alton R. Co. v. Wilson*, 63 Ill. 167.

The company is also liable for injuries occasioned by articles standing or lying upon a platform and obstructing or endangering travel over it. *Martin v. Great Northern R. Co.*, 11 C. B. 179. See also *Corman v. The Eastern Counties R. Co.*, 4 H. & N. 785.

If a passenger attempts to cross behind a train which blocks up the usual point of exit, and in so doing falls over some object left there, and is injured, the company is liable. *Nicholson v. Lancashire, etc., R. Co.*, 34 L. J. Exch. 84; *Holmes v. Northeastern R. Co.*, 37 L. J. Exch. 161.

Where the injury is occasioned by a defective step to the platform, and there is no rule or regulation prohibiting persons from approaching the cars by that way, and an ordinarily prudent person would have approached the train that way, the company is liable. *McDonald et ux. v. Chicago, etc., R. Co.*, 26 Iowa, 124. See also *Davis v. London, etc., R. Co.*, 2 F. & F. 588.

A station and its grounds must be lighted sufficiently to enable strangers to get upon or leave the premises with safety: *Stewart v. Int. & G. N. R. Co.*, 2 Am. & Eng. R. R. Cas. 497; *Rennelker v. S. Car. R. Co.*, 18 Am. & Eng. R. R. Cas. 149; *Brueneman v. St. Paul, M. & M. R. Co.*, 18 Am. & Eng. R. R. Cas. 153. See also *Ind., etc., R. Co. v. Hudecoon*, 13 Md. 625;

Pittsburg, etc., R. Co. v. Brigham, 29 Ohio, 374; Hulbert v. N. Y., etc., R. Co., 40 N. Y. 145; Illinois, etc., R. Co. v. Godfrey, 71 Ill. 500; Patten v. Chicago, etc., R. Co., 32 Wis. 524; Seymour v. Chicago, etc., R. Co., 3 Biss. (C. C.) 4.

The fact that they are lighted sufficiently for the company's agents and servants is not enough. *Martin v. Great Northern R. Co.*, 16 C. B. 180; *Birkett v. White Haven Junction R. Co.*, 4 H. & N. 730; *Corman v. Eastern Counties R. Co.*, 4 H. & N. 785.

A passenger has a right to assume that he can stand upon a platform erected for the accommodation of passengers without being exposed to unnecessary hazard or danger; and hence cannot be held guilty of contributory negligence if injured by a passing train while standing on any part of it. *Dobiecki v. Sharp*, 88 N. Y. 203; s. c., 8 Am. & Eng. R. R. Cas. 485; *Langan v. St. Louis, Ir. Mount. & S. R. Co.*, 3 Am. & Eng. R. R. Cas. 355.

For a full discussion of contributory negligence see notes, 2 Am. & Eng. R. R. Cas. 17; 2 Am. & Eng. R. R. Cas. 37; 3 Am. & Eng. R. R. Cas. 431; 19 Am. & Eng. R. R. Cas. 36.

As to Persons Not Passengers.—The right of protection extends to all persons "who have rightful occasion to use" the station or platforms. *Tobin v. R. Co.*, 59 Me. 183. A passenger arriving is still a passenger for a reasonable length of time, until he leaves the premises. And a person at the station for the purpose of leaving by a train is also a passenger, although he may not yet have purchased his ticket. *Buffett v. Troy & Boston R. Co.*, 40 N. Y. 168.

The same duty which is upon a railway company to provide safe station appliances for the accommodation of passengers devolves upon it in regard to such persons, not passengers, as are there lawfully to receive friends or to part with leaving friends. *Doss v. Mo., etc., R. Co.*, 59 Mo. 27; *Dublin, Wicklow, etc., R. Co. v. Slattery*, L. R. 3 App. Cas. 1155; *Irish Rep.*, 8 C. L. 531; 10 Id. 256; *Lucas v. New Bedford, etc., R. Co.*, 6 Gray. 64; *Keokuk Packet Co. v. Henry*, 50 Ill. 264; *Langan v. St. Louis, etc., R. Co.*, 3 Am. & Eng. R. R. Cas. 355; *McKone v. Mich. Cent. R. Co.*, 13 Am. & Eng. R. R. Cas. 29.

Persons who have business with the company at the stations, such as loading or unloading freight, are entitled to protection, and may recover for an injury occasioned by the unsafe condition of the building or a failure to light it properly. *Wright v. London & N. W. R. Co.*, L. R. 10 Q. B. 288; *Holmes v. N. East. R. Co.*, L. R. 4 Exch. 254; *Louisville & N. R. Co. v. Wolfe*, 5 Am. & Eng. R. R. Cas. 625; *Toledo, W. & W. R. Co. v. Grush*, 67 Ill. 262.

Under this principle it is held that a hackman is entitled to protection. *Tobin v. Portland, etc., R. Co.*, 59 Me. 183.

Trespassers.—There is no liability to trespassers. "The platform of a railroad company at its station or stopping-place is in no sense a public highway. There is no dedication to public use as such. It is a structure erected expressly for the accommodation of passengers arriving and departing in the trains. Being unenclosed, persons are allowed the privilege of walking over it for other purposes, but they have no legal right to do so. The servants of the company, after requesting them to leave, can remove them by whatever force may be necessary." *Sharswood, J., in Gillis v. Pa. R. Co.*, 59 Pa. St. 141. In this case a large number of people gathered upon the platform at the station to salute the President of the United States. The President was travelling by special train, which, by arrangement of the company, made a stop at the station in question. The train was then moved past the station a few yards to enable the crowd to see the President, who was standing on the rear platform of the train. The crowd to obtain a better view pressed to one end of the platform, and the platform gave way. It was held that the company

was not liable. "The plaintiff may not have been technically a trespasser. The platform was open; there was a general license to pass over it. But he was where he had no legal right to be. His presence there was in no way connected with the purposes for which the platform was constructed. . . . The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity or to give vent to his patriotic feelings. The defendants had nothing to do with that." *Sharswood, J. See B. & O. R. Co. v. Scwindline, 8 Am. & Eng. R. R. Cas. 544.*

One who takes shelter from a storm in the station-house with the knowledge and tacit permission of the employees of the company cannot recover. *Pittsburg, Ft. W. & C. R. Co. v. Bingham, 29 Ohio St. 364. See also Leary v. Cleveland, C. C. & I. R. Co., 3 Am. & Eng. R. R. Cas. 498.* A passenger who comes into the station an unreasonable time before the train on which he intends to take passage departs, stands in no better position. *Harris v. Stevens, 31 Vt. 79. See Tebbutt v. Bristol & Exeter R. Co., L. R. 6 Q. B. 73.*

The mere fact that a passenger has gone upon the wrong platform by mistake will not exonerate the company from liability, provided the platform taken by him is also intended for passengers. *Dobiecki v. Sharp, 8 Am. & Eng. R. R. Cas. 485. See McDonald and wife v. Chicago, etc., R. Co., 26 Iowa, 124.*

Where the train stopped at the freight-depot and the passengers got out under instructions of the employees of the company, supposing it was the regular passenger-depot, an averment in the petition that the company were guilty of neglect of duty in not providing "proper lights and accommodations for passengers at its freight-depot" at the time, and that plaintiff's fall and injuries were occasioned by that neglect, is sufficient on general demurrer. *Stewart v. Int. & G. W. R. Co., 2 Am. & Eng. R. R. Cas. 497. See Bennett v. Louisville & Nash. R. Co., 1 Am. & Eng. R. R. Cas. 71.*

As to Right to Eject Passengers from Station for Improper Conduct, see *Beeson v. Chicago, etc., R. Co., 13 Am. & Eng. R. R. Cas. 45* and note.

WALKER

v.

CHICAGO, ROCK ISLAND AND PACIFIC R. Co.

(*Advance Case, Iowa. June 13, 1887.*)

The defendant company received at its yards at Council Bluffs a car of giant-powder. It was placed upon a side-track to await orders as to its future disposition, and while there took fire and exploded, whereby the plaintiff's property was injured. There was no evidence of negligence on the part of defendant; all the light the jury had upon the subject was that the car exploded, and the plaintiff's property was injured. *Held*, that the burden was on the plaintiff to show that the place where the car was stored was an improper place, and that there was no evidence of negligence to go to the jury.

APPEAL from district court, Pottawattamie county.

On the 26th day of September, 1881, a box car standing on a side-track in the freight yard of defendant at Council Bluffs took

fire, and exploded with such force that it injured certain buildings of the plaintiff situated about half a mile away from where the explosion occurred. This action was brought to recover damages for the injuries to said building. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

T. S. Wright and Wright, Baldwin & Haldane for appellant.
D. C. Bloomer and J. H. Keatley for appellee.

ROTHROCK, J.—The car in question was received by the defendant from a connecting road at Englewood, Illinois. It was a through shipment billed to some point west of Council Bluffs. It was received in the regular course of business, and transported to Council Bluffs, and tendered to the Union Pacific R. Co., to be conveyed to its destination. The last-named company, for some reason, refused to receive the car, and the defendant placed it upon a side-track in its own yards to await orders from the east as to its future disposition. After remaining on the side-track about 24 hours, the car was discovered to be on fire. The fire appeared to be inside the car, and two of the employees of the defendant attempted to extinguish the fire with buckets of water. They discovered that the car was loaded with dynamite or giant-powder, and abandoned further efforts to save it. A switch-engine was used to push the car to a water-tank which was near by, and about the time it was placed in proper position at the tank it was thought unsafe to remain near the car, and it was abandoned, and in a few minutes it exploded.

The alleged negligence of the defendant is set out in the petition as follows: "That on or about the said day defendant received from some of its connecting lines a freight car filled with dynamite, giant-powder, or some other highly-combustible substance, so known to be to defendant at the time the same was received by defendant at its said yard, and that said car was unprotected by any sheet-iron, or any fire-proof walls or covering, but was wholly exposed to fire from passing engines or other sources; that, while so exposed to fire, defendant negligently allowed it to stand in the freight yards for a great many hours, during which time the said car took fire on the outside from a passing engine or some other source, which fire communicated to said explosive material, whereby the same, on said day, was exploded, destroying many other cars of defendant, its round-house and freight depot, and the concussion thereof destroyed a large quantity of the glass of the plaintiff in her said buildings above described, and otherwise greatly injuring and rendering insecure said buildings, all of which was the necessary and natural result of the explosion, and of the said negligence of the defendant, whereby plaintiff has been damaged in the sum of six hundred (\$600) dollars, for which judgment is prayed."

The evidence shows quite conclusively that the car was loaded with giant-powder. The plaintiff's counsel in their argument contend that it was ordinary gunpowder. The claim is not only not supported by the evidence, but is not consistent with the averments of the petition which we have herein set out. The case was tried in the court below upon the theory that the explosive substance was giant powder.

The freight yard is composed of some eight or ten tracks, and is about 300 feet wide, and a mile and a half long. The car in question stood on the outer track at the south side of the yard. The wind blew from the south during the day of the accident, and there is no evidence that fire was communicated to the car by engines passing on other tracks. It is true, the charge in the petition is that the car took fire from a passing engine, or some other source; but there is no averment and no evidence that the passing engines were in any manner defective in their machinery for protection against fire escaping therefrom. The sole ground of complaint was that the car was negligently permitted to remain in an improper place; that it should have been placed at some point where, if an explosion occurred, adjacent property would not be injured. This question was submitted by the court to the jury in the following instruction:

"The defendant having a right to receive this car and its contents for transportation, and having a right to so transport them over its line, was under obligation, when the car arrived at Council Bluffs, and at the terminus of its line, to keep the car in its possession until it could be forwarded towards its final destination, or otherwise disposed of, as the owners of the property might direct. If the car was destined for some point further west, and was intended to be forwarded over the Union Pacific Railroad, and the company operating that road refused to receive it from defendant, the defendant could not abandon it, or deliver it to a stranger, but was bound to keep it as safely and carefully as could reasonably be done until arrangement was made for forwarding it, or until the owner gave some direction regarding the disposition of it. The defendant was not obliged to unload this car, and place its contents in storage, if the car was a reasonably safe place to keep such contents while it would have to remain here; nor was it under obligation to provide a freight yard outside of the city, or at any other particular place for the keeping of cars laden as this one was; but it was under this and no greater obligation, viz: that it use such care and caution as reasonably prudent persons would use, under like circumstances, to place said car and its contents where it would not be exposed to unnecessary risk, or unnecessarily endanger surrounding property. And the only question in this case, so far as the liability of the defendant is concerned, is whether the defendant did use this degree of care.

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If it did use the degree of care above indicated, it will not be liable. But if the evidence shows that defendant did not use such degree of care, and its failure to so do caused the explosion which occurred, the defendant will be liable for the injury, if any, caused to the property of others thereby."

We think there was no evidence in the case which authorized the jury to determine whether the defendant was negligent in storing the car on the south track in its yard. It could not remove it from its yard and leave it standing on its main track, without interfering with the passage of trains over its road, and there is no evidence tending to show that the damage to property would have been less if the car had been on any other track or at any other place in the yard.

The court further instructed the jury as follows: "The defendant had a right to assume that the contents of said car were properly packed and properly protected against all the ordinary dangers incident to transportation of cars and their contents over railroad lines, and there is no evidence to show that such contents were not so properly packed and protected."

The evidence shows that while giant-powder is an explosive substance of immense disruptive power, yet, if properly packed, the shipment of it by rail is not attended with any more hazard than the transportation of ordinary merchandise. Now, in view of this evidence and of the instruction by the court to the jury, there was no ground for imputing negligence to the defendant. The relation between the parties to the action is not such that the law presumes negligence in the defendant by the mere fact that the plaintiff's property was injured. The burden was on the plaintiff to show that the place where the car was stored was an improper place. All the light the jury had on this subject was that the car exploded, and the plaintiff's property was injured.

Reversed.

Liability of Carrier for Injuries to Adjacent Property caused by Explosion of Nitro glycerine.—The case of *Parrot v. Wells, Fargo & Co.*, 15 Wall. 524, while not exactly in point, was decided upon the same principle as the principal case, viz., that a person engaged in doing a lawful act is not responsible for an injury which may happen to others in consequence of an accident not produced by want of ordinary care or skill on his part. The facts in this case, familiarly known as the "Nitro-glycerine Case," were as follows: A firm of express carriers received and transported from New York to San Francisco a package of nitro-glycerine, a substance then little known, in ignorance of the name and character of its contents, and without negligence. The package having leaked on the voyage, when it was received at the carriers' warehouse in San Francisco an agent and a servant of theirs, together with a representative of the steamship company which had transported it for them, proceeded in the usual manner, and in ignorance of the character of the contents, to open it for the purpose of ascertaining the cause of the leakage. While they were doing this it exploded, killing all persons present, destroying the building in which it was, and greatly damaging other

buildings. It was *held*, that the carriers were not liable to pay damages for the property thus destroyed, except as to that occupied by them as tenants under a lease, as to which they admitted a liability as for a waste

BONHAM *et al.*, RAILROAD COMMISSIONERS,

v.

COLUMBIA AND GREENVILLE R. Co.

(*Advance Case, South Carolina. March 19, 1887.*)

General Statutes of South Carolina, section 1457, provides that the railroad commission of that State may suggest to a railroad company to make enlargements and improvements in stations and station-houses; and, if their suggestions are not complied with, they are authorized to take such legal proceedings as they may deem expedient, but provides no fine or forfeiture or mode of redress. *Held*, that under this section the commissioners cannot maintain a suit to compel a railroad company to establish and maintain a station-house, under the charge of a competent agent, at a certain place on its road, in their own name; the defendant company, if liable at all, is liable under sec. 1539, which provides that where no penalty has been provided for a violation of the provisions of the statute the penalty shall not be less than \$1000, to be recovered by the State by action in any circuit court, to be brought by the attorney-general upon the request of the commissioners.

APPEAL from circuit court, Richland county.

Ch. Richardson Miles for appellants.

John C. Haskell for respondent.

McIVER, J.—It appears that the plaintiffs in their capacity as railroad commissioners, upon the complaint of sundry persons residing near a point designated as Shelton on the line of the Spartanburg, Union & Columbia Railroad, of insufficient depot accommodations at that point, and after investigation of the FACTS. same, communicated to the defendant company, operating as lessee the Spartanburg, Union & Columbia Railroad, their conclusion in writing as follows: "After a careful consideration of the information in their possession, the board decides that the box car and shed there in use are insufficient for the business of that place, and, in the judgment of the railroad commissioners, it is reasonable and expedient, in order to promote the security, convenience, and accommodation of the public, that a depot building or station-house and passenger-rooms, suitable for the business and travel there, should be erected and placed under a competent agent. These improvements and changes the commissioners adjudge to be proper, whereof your company is hereby given information, in writing, as required by section 1457, General Statutes." The defendant com-

pany having failed, for more than 60 days, to comply with these suggestions of the railroad commissioners, the matter was by them referred to the attorney-general "for the institution of such legal proceedings as may be necessary to secure to the petitioners the improvements and changes which the commission had adjudged to be proper." Accordingly the complaint in this case, which sets forth fully and clearly the facts, together with the sections of the General Statutes relied upon, was filed by the attorney-general, in which judgment is demanded that the "decision and judgment" of the railroad commissioners shall be enforced and carried into effect by the order and decree of the court, and for such other and further relief as the nature of the case may require.

The circuit judge held that section 1457 of the General Statutes conferred no power upon the railroad commissioners to compel a railroad company to build depots, or to restrain it from converting a regular station into a "flag-station." It simply provides that the commission may suggest to a railroad company to make enlargements and improvements in stations and station-houses; and, if their suggestions are not complied with, they are authorized to take such legal proceedings as they may deem expedient; but, as it provides for no fine or forfeiture, no mode of proceeding, and no mode of redress, the court is powerless to enforce their suggestions until the legislature shall prescribe some appropriate mode of legally enforcing such suggestions. He therefore rendered judgment dismissing the complaint.

From this judgment an appeal was taken upon the several grounds set out in the record. Under the view which we take of this case, it will be not only unnecessary, but perhaps improper, for us to consider the questions mainly argued at the bar, for the reason that the proper parties for the adjudication of such questions are not now before the court, and in no view of the case can this action be maintained by the present plaintiffs.

It is conceded that the action is based upon section 1457 of the General Statutes, which reads as follows: "Whenever, in the judgment of the railroad commissioners, it shall appear that repairs are necessary upon any such railroad, or that any addition to the rolling-stock, or any enlargement of or improvement in the stations or station-houses, or any modification in the rates of fare for transporting freight or passengers, or any change in the mode of operating the road and conducting its business, is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, they shall give information in writing to the corporation of the improvements and changes which they adjudge to be proper; and, if the said company shall fail, within 60 days, to adopt the suggestions of said commissioners, they shall take such legal proceedings as they may deem expedient, and shall have authority to call upon

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the attorney-general to institute and conduct such proceedings." Now, whether this section confers upon the railroad commissioners the power to require a railroad company to establish and maintain stations wherever they may see fit, and to employ competent agents to manage the same, or whether they can restrain a company from discontinuing a station or from converting a regular station into a flag-station, are all questions which we do not propose now to consider. For even assuming, for the purposes of this case only, that the railroad commissioners have all this power to the fullest extent claimed, yet we do not think the present action can be maintained by them. It is clear that no penalties are provided in section 1457 for a violation of any of its provisions, nor is there any specific mode of enforcing them prescribed therein. From this it is argued, with much force, by the attorney-general that the court, under its general equity powers, may enforce compliance with the provisions of the section by mandatory injunction or other appropriate remedy, upon the ground that there is no plain and adequate remedy at law. Without undertaking now to determine whether this position can be sustained, it seems to us that the ground upon which it rests, to wit, that there is no plain and adequate remedy at law, is without proper foundation to support it. While it is true that there is no specific penalty, and no particular mode of proceeding prescribed for the violation of its provisions, or for carrying the same into effect in that section, yet we do find in section 1539 of the same chapter of the General Statutes that this omission has been supplied. So much of the last-named section (1539) as amended by the act of the twenty-first December, 1882 (18 St. 18), as relates to this matter, reads as follows: "Each and every act, matter, or thing in this act declared to be unlawful is hereby prohibited; and in case any person or persons, as defined in this act (and as so defined expressly embracing corporations), engaged as aforesaid, . . . shall omit to do any act, matter, or thing in this act required to be done, or shall be guilty of any violation of the provisions of this act, such person or persons shall, where no specific penalty is hereinbefore already provided for such violation, . . . for each offence forfeit and pay a penalty of not less than one thousand dollars, to be recovered by the State by action in any circuit court aforesaid, to be brought by the attorney-general upon the request of the railroad commissioners." It is quite certain that the railroad commissioners have no powers except such as have been conferred upon them by statute; and assuming, as we have done, without however deciding the point, that section 1457 of the General Statutes does confer upon those officers the power to require a railroad company to establish and maintain a station-house to be placed under a competent agent, it would seem to follow that a refusal to comply with such requirement would be a violation of the terms of the act. It would be an omission to do

an act required by the act to be done; for it is obvious that the whole legal force of the requirement is derived from the terms of the statute, and not from the mere will of the railroad commissioners. But for the provisions of the statute the requirement would be *brutum fulmen*, and a refusal to comply would be no violation of the law. Hence, if the statute does authorize the railroad commissioners to make such requirement, it follows necessarily that a refusal to comply therewith becomes unlawful because of the terms of the statute, and is a "violation of the provisions of this act." This being so, inasmuch as section 1457 provides for no specific penalty for the violation of its provisions, the very case is presented which was designed to be covered by section 1539,— "where no specific penalty is hereinbefore already provided for such violation." Hence it follows that this action cannot be maintained by the railroad commissioners, and that the defendant company if liable at all to the penalty imposed by section 1539, it can only "be recovered by the State, by action in any circuit court aforesaid, to be brought by the attorney-general upon the request of the railroad commissioners," as provided in said section.

Upon this ground, therefore, without considering or deciding the point upon which the circuit judge rested his judgment, we are of the opinion that the judgment dismissing the complaint was correct. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C.J., and McGOWAN, J., concur.

Establishment of Stations under Judicial Compulsion.—A court or equity will compel a railroad company to construct a depot and give other railroad facilities at a proper and necessary place. As the duty to establish stations upon a public railway is a public duty, no demand for the placing of a station need be made by the State before bringing suit to enforce it. *Northern Pacific R. Co. v. Territory*, 29 Am. & Eng. R. R. Cas. 82; citing *Railroad Co. v. Portland & O. C. R. Co.*, 63 Me. 280; *State v. Republican Val. R. Co.*, 17 Neb. 647; *State v. Hartford & N. H. R. Co.*, 29 Conn. 538; *High on Extr. Rem.* 203, 225, 390; *Ruggles v. Illinois*, 108 U. S. 526; *Field on Corp.* 585; *Moses on Mand.* 155-169; *Ang. & A. on Corp.* 715; *Board of Commissioners Knox Co. v. Aspinwall*, 24 How. 876. It would appear to be equally well settled that in the absence of express statutory remedies a *mandamus* will issue to compel the erection and maintenance of stations in proper cases; *State ex rel. Mattoon v. Republican Val. R. Co.*, 17 Neb. 646; s. c., 22 Am. & Eng. R. R. Cas. 500; see also *State v. Neb. Telephone Co.*, 22 N. W. Rep. 237. Where, however, as in the main case, a statutory remedy is given expressly or by implication, that remedy must be pursued. Thus under the Nebraska statute of June 6, 1885, which creates a railway commission with general powers of supervision, and requires them among other things, upon proper complaint being filed, to investigate the necessity for an addition or change of station-houses or station, a party who requires the change, addition, or erection of a station must secure the action of the commission before the court will grant a *mandamus* to compel its location. *State ex rel. Moore v. Chicago, M. & St. O. R. Co.*, 27 N. W. Rep. 434. For a full discussion of the whole subject see note to *State ex rel. Mattoon v. Republican Val. R. Co.*, 22 Am. & Eng. R. R. Cas. 506.

TEXAS AND PACIFIC R. Co. *et al.*

v.

MANGUM.

(*Advance Case, Texas. May 27, 1887.*)

The defendant railroad company leased to G. a plot of ground near one of its stations, upon which he erected and maintained a hotel and restaurant. Owing to a defective doorstep placed at the entrance to such house, the plaintiff received severe injuries for which he brings suit. *Held*, that in the absence of evidence that the hotel was managed or controlled by the company, the mere fact that it owned the ground upon which it was erected, and that the company's interests were subserved by having such eating-house near its depot, imposed no duty on the company to keep it in repair, and it could not be held liable for the injury.

Rev. St. Tex. art. 1198, subd. 4, providing that, "when there are two or more defendants residing in different counties, suit may be brought in any county where any one of the defendants resides," means, simply, that if one who is a proper or necessary party defendant resides in the county in which suit is brought, then other defendants who reside in other counties may be joined with him. Under this provision, a defendant residing in another county is entitled, under plea in abatement, to an instruction presenting the question of the liability of the defendant residing in the county where action is brought.

APPEAL from Tarrant county.

W. H. Pope and Davis, Beall & Rogers for appellants.

Furman & Stedman and *Stine & Stine* for appellee.

STAYTON, J.—This action was brought by the appellee to recover from the railway company, and its co-defendant, Ginocchio, on account of an injury alleged to have been received by him by reason of a defective doorstep which was placed at the entrance of an eating-house owned and kept by Ginocchio. The FACTS. house in which Ginocchio was keeping a hotel or restaurant was on ground leased to him by the railway company for the period of 20 years, with a view to have thereon a house erected for the accommodation of the travelling public; and the house was erected by Ginocchio under plans furnished by the company, which are not claimed to have been in any way defective. The house belonged to Ginocchio, who erected it at his own expense. The lease contained provisions which gave the company the right to purchase the house, and terminate the lease, if Ginocchio failed to keep a first-class establishment of the kind contemplated. The land leased was contiguous to the platform of the railway company, and only 38 feet distant from its track. In front of the house of

Ginocchio was a small platform erected by him, which connected with the platform erected by the company. It becoming necessary to elevate the house erected by Ginocchio, this was done; and, to furnish a step from the platform erected by Ginocchio to the house, he caused a piece of timber about 10 by 12 inches thick, and extending in front of several doors, to be placed on the platform erected by himself. It is claimed that this was placed so far from the house as to leave a space between it and the house so wide that the plaintiff's foot, in leaving the house, came between the step and the house, and that thus his leg was broken. It is not averred that any part of the platform erected by the company was defective, nor that the platform erected by Ginocchio was defective otherwise than as the step may be considered a part of the platform, nor that the injury resulted from any other cause than the defective step and the want of proper lights. The petition contains many general averments of negligence on the part of the railway company, without specification of the facts which constitute such negligence further than that the railway platform was not well lighted; but the inference is sought to be drawn from the terms of the lease that it was the duty of the company to cause the leased premises to be kept in safe condition.

The plaintiff had come to the company's depot, in the night, to take passage on the expected train, and, while waiting, entered the restaurant. It is further alleged that it was necessary for persons coming to take the train to use the platform erected by Ginocchio as well as that erected by the company, but there is no evidence that this was so.

It is alleged that, after the lease was made, Ginocchio, in accordance with specifications furnished by the company, built a good and substantial house, in which he kept a first-class hotel and restaurant, which was intended by the company, and was used by Ginocchio, "as an accommodation and convenience to the travelling public, and especially to the passengers of said company who were soon to take passage on, or had just departed from, the trains of said company at said city of Fort Worth; that the travelling public, and particularly the passengers of said company, commonly and frequently resorted to said restaurant, eating-house, and hotel at and before and subsequent to said December 5, 1883, which fact was well known to said Ginocchio and to said company, its agents and servants; that the object and design of said railway company in leasing said land to said Ginocchio, to have said building erected thereon as aforesaid, was to make the use of said building for the purposes mentioned a valuable auxiliary to its business as a common carrier of freights and passengers, and the purpose of said Ginocchio was his private gain; and by the use of said building for the purposes mentioned the object of both parties has been effected." Ginocchio was alleged to be a resident of Harrison

county, Texas, and the railway company to have its road and an agency in Tarrant county. Ginocchio filed a sworn plea in abatement, in which he set up the continuous residence of himself in Harrison county; and, further, that the railway company had no interest whatever in the business conducted by him on the ground which he had leased from it, but "that he leased the ground upon which the building is erected, and was erected at the time plaintiff claims to have received his injuries, in which said building said lunch-stand, eating-house, and drinking-saloon was then and is now kept, from the said railroad company, for the purpose of carrying on said business for his own benefit, and not for the benefit and profit of said railway company, and that said railway company has no interest in or concern in the same, except to collect the rent for said ground as aforesaid." The plea was sufficient to raise the question whether the plaintiff sought improperly to join Ginocchio as a defendant in an action brought in a county other than that of his residence.

This is not an action founded on some crime, offence, or trespass committed by Ginocchio, which would authorize it to be brought in the county where the crime, offence, or trespass was committed, under the eighth subdivision of article 1198 of the Revised Statutes. The fourth subdivision of that article provides that, "when there are two or more defendants residing in different counties, suit may be brought in any county where any one of the defendants resides." This, however, does not mean that an inhabitant of this State may be sued in a county other than that of his residence whenever a plaintiff, without sufficient ground, may join with him as a defendant some person who may be a resident of the county in which the action is brought. It means, simply, that if one who is a proper or necessary party defendant resides in the county in which the action is brought, that then other defendants may be joined with him who reside in other counties. It is very generally held that a corporation is an inhabitant of the State under whose law it is incorporated, and that it has a residence wherever it conducts its ordinary business. *Railway Co. v. Letson*, 2 How. 497; *Conroe v. Insurance Co.*, 10 How. Pr. 403; *Baldwin v. Railroad Co.*, 5 Iowa, 519; *Richardson v. Railroad Co.*, 8 Iowa, 263; *Pond v. Railroad Co.*, 17 How. Pr. 544; *Belden v. Railroad Co.*, 15 How. Pr. 18; *Glaize v. Railroad Co.*, 1 Strob. 72. If, however, the statute which provides that "the public office of a railroad corporation shall be considered the domicile of such corporation" were held to fix the residence of such a corporation, under the laws regulating venue to which we have referred, then, as the plea does not negative the fact that the public office of the railway company was in Tarrant county, for the purposes of the plea, it would have to be presumed that this was the residence of the corporation. Conceding, for the

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purposes of this case, that the residence of the railway company was in Tarrant county, then, if there was no common obligation resting on it and Ginocchio to keep in proper condition, and well lighted, the entrance into the restaurant, the latter should not have been made a party defendant to an action brought in a county other than that of his residence. A charge was asked by Ginocchio which would have presented this question, but the court refused to give it, and this was error which will require a reversal of the judgment, unless the charge given by the court sufficiently presented the same question.

There was some evidence tending to show that the improvements erected by Ginocchio extended a few inches further towards the railway track than, under lease, they ought to; but it must be held that the railway company conceded that the lease covered all the ground which Ginocchio was permitted to build upon and exclusively occupy. There is also evidence tending to show that, at times, freight may have been temporarily placed on the platform erected by Ginocchio, but there is no evidence to show that the railway company controlled, or had the right to control, the place at which the injury occurred.

The only instruction bearing on the question of common liability which the court gave was as follows: "You are further instructed that if you believe from the evidence that the defendant Ginocchio erected said house under said lease, and that, at the time of the alleged injury, the same was being used as an eating-house for the accommodation of the employees of the defendant railroad, or for persons travelling over this said road, that it then became the duty of the defendant the Texas & Pacific R. Co. to keep in safe condition all portions of their platform leading to or lying between their road and the leased premises, and to keep the same sufficiently lighted to enable persons to pass safely; and if you believe from the [evidence] that the said Ginocchio, his agents or employees, negligently or unskilfully placed said piece of timber on the platform used or controlled by the Texas & Pacific R. Co., and that the said company permitted the said Ginocchio to so place the same on any part of the platform owned or controlled by said Texas & Pacific R. Co., and that, by reason of said piece of timber being carelessly and unskilfully placed, the plaintiff, without any fault or carelessness on his part, was injured, then you should find for the plaintiff against both said defendants."

This charge did not correctly present the question which defendant Ginocchio, under his plea, was entitled to have passed upon; and, besides, was in some respects erroneous and misleading. It assumes if the house of Ginocchio was used as an eating-house by the travelling public and employees of the company, that it was its duty to keep in good repair and well lighted the passageway be-

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tween its road and the leased premises, and so, notwithstanding a part of the way may have been under the exclusive control of Ginocchio under the lease. The fact that Ginocchio leased the ground from the railway company, and that the buildings erected by him on it were used as an eating-house, at which, on account of its nearness to the railway depot, travellers and its employees frequently took their meals, did not impose upon the railway company any duty to keep in repair or well lighted the passageway to the house, any more than would such duty have been imposed had the house been erected on ground owned by Ginocchio. Those who entered the eating-house did so under the implied invitation given them by its keeper and owner, and not upon any invitation extended to them by the railway company; and in such case the tenant, and not the landlord, would be liable for any injury resulting from defects in the rented premises. *Shear. & R. Neg.* 503; *Thomp. Neg.* 317; *Marshall v. Heard*, 59 Tex. 267. There was nothing in the contract to lease which could change this general rule. There is no evidence that any part of the platform which it was the duty of the railway to keep in repair was not in good condition, or that the injury resulted from any defect in a platform. Nor is it shown that the injury resulted from the want of any light which it was the duty of the company to keep.

The platform erected by Ginocchio on which the step alleged to have been defective was placed was, in a restricted sense, owned, as was the land on which it was placed, by the company; but this would not render the landlord liable for injuries resulting from defects in it, or in the step placed on it by the lessee during the lease. The charge, however, informed the jury that the company would be liable if it permitted the lessee to negligently or unskillfully place the step on any part of the platform owned or controlled by it.

There is no evidence that the company controlled, or had the right to control, the place where the step was, so long as the lease continued. If the charge given by the court had correctly presented the question of joint liability, the failure to give the charge asked by the lessee would be unimportant, the jury having found such liability to exist; but this finding may have resulted from the erroneous and misleading charge given. The first part of the charge of the court, which had reference to the facts which would relieve the company from liability, was in the main correct, but it left the jury to determine what would be acts of negligence on the part of the company; and from subsequent parts of the charge, which we have considered, they would have been justified in finding that negligence on the part of the company existed where facts to justify such a conclusion did not exist. The charges asked by the railway company would have presented the law, applicable to the case made by the evidence, clearly; and while repetitions con-

tained in the several charges asked may have rendered it improper to give them all, some of the distinct charges asked should have been given. For the errors noticed the judgment of the district court will have to be reversed, and it becomes unnecessary to consider other assignments of error.

It is ordered that the judgment of the district court be reversed and the cause remanded.

Analogous Case.—For injuries occurring on the company's premises, over which it has no control, it is not liable. Where, however, the plaintiff was at the defendant's depot for the purpose of taking a train, and was injured in attempting to descend steps which were built and solely used by an express company, but which were on the defendant's premises and under its exclusive control, it was held that the defendant company was liable. *Beard v. Conn. & Pass. Riv. R. Co.*, 48 Vt. 101.

HOAGLAND *et al.*

v.

NEW YORK, CHICAGO AND ST. LOUIS R. CO.

(*Advance Case, Indiana. May 10, 1887.*)

The defendant railroad company by mesne conveyances became the owner of the Wabash & Erie Canal, originally owned by the State of Indiana, but sold under foreclosure to satisfy the liens of the State's creditors, and thereby assumed a lease originally made by the State to the plaintiff's grantors of so much surplus water not required for navigation, to be taken by the lessees from the canal, as should be adequate to propel a designated amount of machinery in the lessee's mills. Before the defendant acquired its title the canal had been abandoned for purposes of navigation. The defendant then proceeded to construct its railway and track on the line previously occupied by the canal, thereby filling up the channel of the canal and causing the water to be obstructed to such an extent as practically to deprive the mill-owners of their power. In an action by the mill-owners to recover damages for obstructing the flow of the water to the mill, *held*, that the effect of the covenant for quiet enjoyment, which the law annexed to the lease originally executed by the State for the use of the surplus water, was that so long as the canal was used for purposes of navigation, and while there was, during the period it was so used, a surplus of water above that required for navigation, the State and its grantees agreed that they would do no such acts as would interrupt or deprive the lessees of its enjoyment. So long, therefore, as the owners did not act in violation of this covenant they cannot be liable for a breach of the covenant of quiet enjoyment, and there being no other covenant a liability can arise from no other cause. The grantees of the State were under no obligation to keep the canal in such a condition of repair as to afford water for the mill. The lease being subordinate to the liens of the State's creditors, the lessees were bound to take notice of the prior rights lawfully acquired at the time they took their leases, and those who acquired title under these prior rights took all the rights of the State

with the same obligations as it owed in respect to outstanding leases, and they had the same right the State had to abandon the work or to devote it to any other public use, within which is included the right to conduct a railroad track.

APPEAL from superior court, Allen county.

L. M. Ninde for appellants.

R. C. Bell for appellee.

MITCHELL, J.—Pliny Hoagland and Christian Tresselt sued the New York, Chicago & St. Louis R. Co. to recover damages for obstructing the flow of water to their mills. The facts are briefly as follows: On the 29th day of November, 1842, FACTS. the State of Indiana, having partially completed the Wabash & Erie Canal, made a lease of lots 24 and 25, in the original plat of the city of Fort Wayne, to Allen Hamilton and Jesse L. Williams, and in the same instrument granted them the use of so much of the surplus water of the Wabash & Erie Canal, not required for the purposes of navigation, as would be sufficient to propel three run of $4\frac{1}{2}$ feet mill-stones, for a term of 30 years. The lease contained a stipulation that it might be renewed, upon certain terms, for an additional term of 30 years. The lessees took possession under the first lease, and erected a flouring-mill, which, with the appurtenances and other improvements made on the leased premises, are alleged to be of the value of \$40,000. Prior to the expiration of the first lease, the State transferred its interest in the canal and appurtenances to a corporation created by an act of the general assembly, known as the "Board of Trustees of the Wabash & Erie Canal." Pursuant to the provisions contained in the original lease, the board of trustees, on the 8th day of May, 1872, granted a new lease of substantially the same rights for the additional term of 30 years. Hoagland and Tresselt are the owners of this last lease by assignment. Neither of the leases contained any covenant to repair, nor was there any covenant for quiet enjoyment, or for a continuation of the right to use the surplus water from the canal, except such as would be implied by law. The right of the lessees to use water from the canal was made expressly subject to the right of the lessors to draw off the water, either wholly or partially, for the purpose of preventing or repairing breaks, or removing obstructions from the canal. It was also stipulated that if the water should be drawn off for any of the purposes above named, or if the supply became inadequate, and the lessees should be wholly or partially deprived of water, a corresponding reduction should be made in the rent. Under these leases the original lessees and their assigns continued to draw and use the surplus water from the canal until about the year 1882, when it is alleged the New York, Chicago & St. Louis R. Co.,

having, so far as it appears, lawfully acquired the equitable title to the canal and its appurtenances at the point where it traverses the city of Fort Wayne, and for some distance beyond, proceeded to construct its roadway and track on the line previously occupied by the canal; thereby filling up the channel of the canal, and causing the water to be obstructed to such an extent as practically to deprive the mill-owners of their power.

The railway company acquired its right to the canal in the manner following: The State having become largely indebted through the construction of a system of public improvements which it had undertaken, transferred its interest in the canal to the Board of Trustees of the Wabash & Erie Canal on the 30th day of July, 1847. The board of trustees took the property in trust for the payment, out of the revenues to be derived from its operation, of certain bonds and interest coupons which were accepted by creditors of the State in lieu of obligations previously owing to them by the latter. The revenues proved insufficient to meet the maturing obligations thus accepted, and the lien of the bondholders, which antedated the leases under which the mill-owners' rights accrued, was foreclosed. The canal and its appurtenances were sold under a decree of foreclosure. The railroad company acquired its right through mesne conveyances under this decree, the title having been conveyed to one Howard for its use. Prior to the acquisition of the title by or for the use of the railroad company, the canal had become dilapidated, and had fallen into disuse and decay, and had long before that been abandoned as a highway of commerce, or for any public or commercial purpose. The mill-owners had, however, regularly paid to the successive owners, prior to the railway company, the rents stipulated in the lease. Upon the foregoing facts the question arises whether or not the railway company is liable to the owners of the mill for filling up the canal, and obstructing the flow of water to their wheels.

The theory upon which the appellant's case proceeds is that although the State and its grantees may not have incurred an affirmative obligation to keep the canal in repair, or to supply the lessees with water, the law, nevertheless, by implication annexed to the lease a covenant for quiet enjoyment. The law having imported such a covenant into the lease, it is contended that the entering upon and filling up the bed of the canal, and thus cutting off the flow of water upon the lessees' wheels, was an invasion of their right, and a disturbance of their possession by the lessor, and hence such an act of aggression and wrong as renders the railway company liable for the resulting injury to their property. That a covenant for quiet enjoyment, and that the landlord agrees to do no such acts as will destroy the beneficial use of the leased premises, is implied in every mutual contract for leasing land, by whatever form of words

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the agreement is made, is now too well settled to be doubted or shaken. *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. Rep. 123; *Smith v. Dodds*, 35 Ind. 432; *Wade v. Halligan*, 16 Ill. 507; *Streeter v. Streeter*, 43 Ill. 155; *Mack v. Patchin*, 42 N. Y. 167; *Maule v. Ashmead*, 20 Pa. St. 482; *Eldred v. Leahy*, 31 Wis. 546; *Woods Landl. & Ten.* 564.

The more serious question usually encountered is that which relates to the measure of the lessee's damages when such a covenant is broken. Ordinarily, if the landlord takes possession or obstructs the tenant in the enjoyment of any material part of the demised premises, without the latter's consent, that will constitute in law an eviction of the tenant, and will operate to release him from any further liability to pay rent, even for so much of the leasehold as he may continue to occupy. *Mack v. Patchin*, *supra*; *Bentley v. Sill*, 35 Ill. 414; *Smith v. Stigleman*, 58 Ill. 141. The measure of damages for the breach of a covenant for quiet enjoyment depends largely upon the nature of the estate or title granted, and the character of the landlord's default. The covenant always relates to, and never extends beyond, the interest, estate, or privilege granted. It is restrained and limited to the estate demised. *Rawle Cov.* 524. The legal implication of the covenant is that the landlord has an adequate title to the estate created by the lease and that he will permit the tenant to enjoy, without disturbance or interruption, the interest, title, or privilege demised, subject to all such rights as are expressly or by necessary implication reserved to the lessor. It becomes important, therefore, to inquire into the nature of the right or privilege granted to the lessees by the lease in question, and to ascertain the rights expressly or impliedly reserved to the lessor.

The subject-matter of the lease was so much of the surplus water not required for navigation, to be taken by the lessees from the Wabash & Erie Canal, as should be adequate to propel a designated amount of machinery in their mills. The decisions of this and other courts establish beyond question that the lessor, by the terms of the lease in question, assumed no obligation to maintain the canal in repair, or to keep it in such a condition as that a surplus of water above that needed for navigation should be available. The lease imposed no obligation whatever to furnish or supply the lessees with water. It did nothing more than confer upon them the privilege of using the surplus water whenever and so long as there should be a surplus above that employed in navigation. Indeed, it is apparent from the face of the lease that both parties contemplated that the supply of water might become partially or wholly inadequate. In the event of such a contingency, the lease made provision for a corresponding reduction or suspension of rent. Both parties recognized the fact that the canal was constructed for

OBLIGATIONS IM-
POSED BY LEASE.

the purposes of commerce. It was built for purposes of navigation and intended to be used primarily as a line of intercommunication. Neither party, at the time of the lease, apparently contemplated the abandonment of the canal for the purposes for which it was constructed. Hence no provision was made restricting the lessor from using all the water for purposes of navigation, nor from entirely abandoning the canal at pleasure, or requiring that it should be kept in repair. The character of the work was such that the right of the State, and its grantees, to use all the water, or to abandon the enterprise entirely, was necessarily incident to the situation. By their lease the lessees simply obtained the privilege of using, for motive power at their mill-wheels, so much of the surplus water passing through the canal as was not necessary to carry out the primary purpose for which the work was constructed. The State and its grantees, who succeeded to its rights and liabilities, had the right to resume the use of all the water, or to abandon the canal entirely at pleasure. Whether they exercised the right of abandonment or resumption, the effect upon the privilege granted to their lessees was the same. In neither event did the lessor become liable to any other consequence than the inability to collect rent from the lessees. *Hubbard v. City of Toledo*, 21 Ohio St. 379; *Fox v. Cincinnati*, 104 U. S. 783; *Sheets v. Selden*, 7 Wall. 416. As it was in effect said by the court in *Fishback v. Woodruff*, 51 Ind. 102, the lessees took the lease subject to the uses of the canal, and to all the vicissitudes which might attend a public work of this character, such as dilapidation, destruction, abandonment. They could not suppose that the State or its grantees would keep up the canal for the purpose of furnishing them water-power if it became inexpedient to maintain it as a public work. It necessarily follows that the privilege granted to the lessees was at all times subject to two contingencies. The prime contingency was that all the water flowing through the canal might be employed for the purpose of navigation. The other was that the canal might become out of repair, and be abandoned as a public work entirely. In either event the privilege of the lessees was subordinate to the requirements of the public, or liable to be cut off entirely, unless by the mere grace of the State and its grantees. The covenant for quiet enjoyment, which the law annexed to the lease in controversy, was therefore such that so long as the canal was used for purposes of navigation, and while there was, during the period it was so used, a surplus of water above that which was required for navigation, the lessors agreed that they would do no such acts as would interrupt or deprive the lessees of its enjoyment. This was the extent of the covenant, because the privilege granted, and to which the covenant related, extended no further. So long, therefore, as the owners do not act in violation of this covenant, they cannot be liable for a breach of the covenant of quiet enjoyment. The canal having

been abandoned for purposes of navigation, possibly the grantees of the State, had they so elected, might have kept it in such a condition of repair as to have afforded water-power for mills and manufactories. It is abundantly settled, however, that they were under no obligation to do so. *Trustees v. Brett*, 25 Ind. 409; *Skillen v. Water-works Co.*, 49 Ind. 193; *Fishback v. Woodruff*, *supra*; *Elevator Co. v. Cincinnati*, 30 Ohio St. 629; *Com. v. Pennsylvania R. Co.*, 51 Pa. St. 351.

The question remains, had the State or its grantees the right to devote the canal and its bed to some other use which would interrupt the flow of water, or were they under obligation, having abandoned it for purposes of navigation, to permit it to remain idle and unoccupied? Having reached the conclusion that the lessors were not prohibited by the terms of the lease from using all the water in the canal, nor from abandoning it entirely for purposes of navigation, it necessarily follows that, in the absence of any contractual obligation, the lessors had the right to appropriate the abandoned canal to any other use which they saw fit, if they could do so without invading or appropriating any of the lessees' property which had lawfully been placed upon the lots appurtenant to the canal. The appellants, impliedly, at least, concede that the State and its grantees had the right to abandon the canal as a public work. Having the right to abandon it for that purpose, it never could have been intended that the lease should deprive the owners of the property of the right to substitute another line or mode of transportation instead of that originally projected. To give the lease that effect would be to subordinate public interests to merely private convenience. The lessees, as we have seen, having acquired no continuing interest in the water of the canal, the State invested its grantees successively with the same rights in the canal which it possessed when it transferred the work to the board of trustees. The trustees and their grantees acquired the rights of the State and assumed its obligations, and none other. *Hubbard v. City of Toledo*, *supra*. It would have been a barren security for the creditors of the State if they had been compelled to accept in pledge of what the State owed them a public work which had already proved unprofitable, and which they might have abandoned, but could never use for any other purpose, because certain leases of surplus water had been made. These leases, it must be remembered, too, were subordinate to the liens of the State's creditors. The lessees were therefore bound to take notice of the prior rights lawfully acquired at the time they took their leases. Those who acquired title under the pledge made by the State took all the rights of the State with precisely the same obligations as it owed in respect to outstanding leases. The State having come under no other covenant to the lessees, except that it agreed not to interfere with their privilege

RIGHT TO DEVOTE CANAL TO OTHER USE—OBSTRUCTING STREAM.

of using their surplus water not needed for navigation so long as the canal was in operation for that purpose, it had the right, in the public interest, to abandon the work or devote it to any other public use. Its grantees have the same right. *Com. v. Pennsylvania R. Co.*, *supra*; *Fox v. Cincinnati*, *supra*. It does not appear that the railroad company has invaded any of the appellants' property rights or encroached upon the property leased, otherwise than by the obstruction of the canal.

There is nothing in the cases of *French v. Gapen* and *Spears v. Gapen*, 105 U. S. 509, in conflict with what has been herein decided. In one of those cases a contractor for the construction of certain portions of the canal was, by the terms of an agreement made with the State, to be paid for his work in water-rents. It was held that the contractor held a property right in the rents of the water-power which he rendered available, and that the State became a trustee to collect and pay the rents to him until his debt was liquidated. In the other a valuable privilege of a mill-owner was rendered useless by the construction of the canal. The canal commissioners agreed, in consideration that the mill-owner would release all claims, awards, and judgments in his favor against the State, that the State would supply him, in lieu of his privilege so destroyed, with a certain amount of the surplus water from the canal. It was held that, when the State transferred the canal to the board of trustees, the latter took it subject to the prior obligation of the State to the contractor and mill-owner, respectively.

The conclusion at which we have arrived is that the appellees are not liable upon the facts stated; and as the court below arrived at a like conclusion, its judgment is affirmed, with costs.

ZOLLARS, J., did not participate in the decision of this case.

Agreement of Company to Convey Water from a Spring Across its Road-bed Not Violated—Diversion—Damages.—The deed which the defendant, a railroad corporation, received from the plaintiff, contained the following agreement: "And said railroad company further agrees to convey the water from the spring at the foot of the hill by a pipe under the bed of said railroad to the south limit line of said railroad so as to be accessible for watering stock on the part of the farm lying south of said railroad." The spring was near the railroad. After the giving of the deed the company opened a quarry near the spring and changed the flow of water so that it ran some distance along the line of the road, where it accumulated, and from that point it was conducted by the defendant to the plaintiff's premises on the south side of the road. Plaintiff claimed that by this change he was deprived of the full flow of the spring and that the water was rendered impure. Other provisions in the deed gave defendant the right to construct a sloping embankment at the point where the spring was located, which would have the same effect as that complained of. In an action to recover damages for breach of the agreement contained in the deed, *held*, that the defendant performed its whole duty to the plaintiff by conveying the water to his premises on the south side of the road, so that it would be accessible for watering his stock,

and that it was not bound to convey it from the former site of the spring; but that the plaintiff could recover such damages as resulted from an insufficient supply or from the water being rendered unfit for use for his stock, if such was the result of the change. *Chamberlin v. Baltimore & Ohio R. Co.*, 10 Eastern Rep. (Md.) 609, 29 Am. & Eng. R. R. Cas. 583.

ANDERSON

v.

CINCINNATI SOUTHERN R. Co.

(*Advance Case, Kentucky. June 18, 1887.*)

A railroad company erected across a stream a dam in order to form a reservoir, using the water for the purpose of operating its engines. A riparian mill-owner brought suit for damages resulting from this alleged unlawful obstruction and use of the water of the stream. The company set up as a defence the fact that it had leased its road, including the dam. *Held*:

1. That the fact that the road had been leased was not available as a defence.

2. That the use made of the water of the stream by the railroad was not a use for natural or domestic purposes; and if by such use the flow of water to a mill is diminished, and the capacity of the water-power below is lessened, it must answer in damages to persons injured thereby, but not so in any other case.

APPEAL from circuit court, Pulaski county.

Curd & Waddle and *Parker & May* for appellant.

Morrow & Newell for appellee.

LEWIS, J.—Appellant is the owner of a water grist-mill erected by him, in 1872, on Pitman's creek, under an order of the Pulaski county court granting the leave as provided by law in such cases. Across the same creek, about one mile below its source, FACTS. and two miles above appellant's mill, appellees, the trustees of the Cincinnati Southern Railway, under charter granted by the general assembly, subsequently built their road; and at the same time erected, just above the railroad crossing, a wooden dam four feet high, by which a reservoir was formed, from which water was taken to a supply tank to be used in running their trains. But in 1877 or 1878, several years after the completion of their road, they erected, in place of the wooden dam, one built of stone laid in cement, 14 feet high, by which a reservoir was formed covering 10 or 11 acres of land purchased by them of the riparian owner. This action was brought by appellant against appellees for the alleged wrongful and unlawful obstruction and diversion, by reason of the stone dam, of water that hitherto flowed to and sup-

plied the power for the operation of his mill, whereby, as he states, he has been injured, and to a great extent deprived of the use and enjoyment of said mill. For their defence appellees answer—*First*, that since July, 1877, the railroad built by them, together with its franchises, appurtenances, and including the stone dam and reservoir, had been leased by them to the Cincinnati R. Co., and the Cincinnati, New Orleans & Texas Pacific R. Co., and appellees have not since that time been in the possession or had control of the dam or reservoir, and are not therefore, liable for the injury complained of; *second*, they deny that the flow of water to appellant's mill has, to any extent, been perverted or delayed by the erection of the stone dam, and state that there is no stream of water having channel or banks above the point where the dam is located,—the reservoir being supplied with water by surface drainage at times by heavy rains,—and that, if the water which flows above the dam was unobstructed, it would not in any way affect appellant's mill, because the quantity, during a portion of each year, is so small as, even when added to that below, to be insufficient to run the mill, while during the residue of the time the quantity flowing below is sufficient to operate it as fully as if the dam had not been erected.

In our opinion, the first defence is not available. The stone dam which it is alleged by appellant obstructs and diverts the natural and accustomed flow of water to his mill was erected by appellees as an appurtenance to their road, and, being the primary and continuing cause of the injury complained of, there can be no question of his right to maintain this action against them for whatever damage has been unlawfully caused thereby. How far the lessees of the railroad may be liable, if at all, for taking the water already obstructed by the dam of appellees, and using it in operating their trains, is a question not now presented.

The right of every riparian owner to the enjoyment of a stream of running water in its natural state in flow, quantity, and quality is now well established. "Every proprietor of lands on the banks of streams has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it is wont to run, without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. '*Aqua currit et debet currere ut currere solebat*,' is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining

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proprietors he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant, or an uninterrupted enjoyment of twenty years [fifteen under our statute], which is evidence of it. This is the clear and settled general doctrine on the subject. All the difficulty that arises consists in its application." 2 Kent Comin. 439. The primary use of water is for natural and domestic purposes, and each proprietor of the land through which it flows may use as much of it as is necessary for those purposes, even if it be entirely consumed in the use; but he is limited, as regards other purposes, to a reasonable and proportionate use, which must not be such as to exclude others from a benefit to which they are equally entitled with himself." *Wadsworth v. Tillotson*, 15 Conn. 366; *Evans v. Merriweather*, 3 Scam. 492; *Arnold v. Foot*, 12 Wend. 330; *Davis v. Fuller*, 12 Vt. 178; *Mayor, etc., v. Commissioners Spring Garden*, 7 Pa. St. 348. Water may by a riparian owner be withdrawn from a stream by ordinary means, or by artificial channels, for the purpose of supplying the wants of men and animals, even to the extent of producing a material diminution in the force and volume of the current. But it cannot be withdrawn for the purpose of irrigation, or for any other secondary and artificial purpose, except in such a reasonable and legitimate way as not to interfere unjustifiably with its general use. *Weston v. Alden*, 8 Mass. 136; *Colburn v. Richards*, 13 Mass. 420; *Cook v. Hull*, 3 Pick. 269; *Anthony v. Lapham*, 5 Pick. 175; *Evans v. Merriweather*, *supra*.

It has always been the policy in this State to encourage the building of water-mills; and, being considered of "public use," the exercise by the legislature of the right of eminent domain in favor of them has never been called in question by the courts. By section 1, c. 77, Gen. St., which is substantially the same as section 1 of the act of 1797, continued in force by the Revised Statutes, it is provided that "a person owning land on a water-course, the bed whereof belongs to him or the commonwealth, and desiring to build on such land a grist-mill, or other mill or manufactory, useful to the public, and needing a dam in or across the water-course, or the raising of an established dam, or the cutting or enlarging of a canal above or below, may, by petition in writing filed in the county court of the county in which is situated the principal part of the land asked to be condemned, obtain therefrom a writ of *ad quod damnum* for the purpose of making the necessary condemnation, which shall embrace all the land demanded, whether lying in the same county or not." But by the subsequent section of the same chapter it is provided that such leave shall not be granted if thereby the mansion-house of any other than the applicant, or the out-houses, or any part of the yard, garden, or orchard thereto belonging, will be overflowed or taken, or that any other

legally established mill will be materially injured thereby, or that the health of the neighbors will be injured; and that no person shall, by reason of such leave, draw the water from the mill-pond of another existing at the time of the leave, or otherwise do anything injurious to a vested right in any water-works then existing on the water-course. By virtue of the leave thus granted to erect a mill or manufactory on a water-course in this State, the owner acquires right which cannot be lawfully infringed by any other person or corporation, or taken or applied to public use without just compensation being previously made. By virtue of this statutory proceeding one constructing a dam, or intending to do so, may apply to the county court, and obtain permission to do so by paying to the riparian proprietors below and above the dam such damages as they may likely sustain by reason of its construction; and this is a full protection to the applicant; but, if no application is made to the county court, he still has the right to use his own land, and the water flowing over it, when not injuring others, as there is no restriction to be found in the statute, or elsewhere, by which the owner of the land where the stream runs is prohibited from building a dam when not interfering with the rights of others; but in doing so, if he so obstructs the natural flow of the water as to lessen the supply of his neighbor below, or to overflow his land above, he must answer in damages. The owner is entitled to the reasonable use of the water for natural and domestic purposes; but when he undertakes to divert the course of the stream, or detains the water by means of a dam so as to prevent the previous supply to other riparian owners, he becomes a wrong-doer.

In this case the owner of the mill below has protected himself against any claim for damages by reason of the extraordinary use of the water, by his application to the county court; but if he had obtained no such leave, and the running of his mill obstructed the passage of the water, and diminished its flow to the injury of those below, he would have been liable for the injury. So in this case, although the railway company owns the land, if the construction of its dam, and the use of the water, diminished the flow to appellant's mill, so as to affect the running of his mill, it must be regarded as an unreasonable use of the water, because the use of the water for the purpose of supplying the boilers on trains running on the road is something more than the ordinary use for domestic purposes. The use and detention of the water on a large stream by means of a dam for the purposes of the railroad might not be an unreasonable use, as ordinarily there would be ample water left for all the purposes of the riparian owner below; yet where the stream is small, or even large, if the dam so obstructs the water as to diminish the flow, and lessen the capacity of the water-power below, it is an injury to the proprietor for which damages may be awarded. The question, therefore, in this case, is not whether the

railroad company made an unreasonable use of the water, but whether its use for the purposes of the railroad injured the mill below. Where the water is detained by dams so as to run mills, or supply locomotives, it is not an ordinary use of the water; and while the company may not use more than is reasonably necessary for running its trains, nevertheless, if it injures the mill of the plaintiff, he is entitled to recover. The instruction that the company had the right to its reasonable use was therefore misleading. The mere detention of the water, or the construction of the dam, is not of itself the injury. It must be such a detention as impedes, delays, or affects the running of plaintiff's mill. If the use by the railroad causes no material injury to the owner, then no recovery can be had, and this is a question of fact for the jury to determine.

The judgment below is therefore reversed, and remanded for a new trial in conformity with this opinion.

What is Lawful Use of Water of Stream.—See *Pennsylvania R. Co. v. Miller*, 25 Am. & Eng. R. R. Cas. 282; *Garwood v. New York, etc., R. Co.*, 2 Ib. 490.

SABINE AND EAST TEXAS R. Co.

v.

HADNOT.

(*Advance Case, Texas. March 15, 1887.*)

The plaintiff brought suit against the defendant company under Tex. Rev. St., art. 4171, to recover damages for injuries to crops alleged to have been caused by the construction of insufficient culverts, whereby the natural drainage of the surface-water was impeded. The petition averred that the effect of the construction of defendant's road was that its grade obstructed the drainage of the surface-water over certain sections of land, subject to overflow, so as to cause it to stand from one to six weeks longer than it would have otherwise done under similar circumstances. *Held:*

1. That the petition was sufficient. It need not allege negligence or want of skill in the construction of its railway in those very words.

2. That if the value of the crops is averred in detail in the petition, it is sufficient in that regard on general demurrer, although some of the allegations of damage should properly have been stricken out.

3. That the company was not liable if the overflow was of such extraordinary character that ordinary prudence would not have provided against it in the construction of the culverts, but that if the flood, though extraordinary, might reasonably have been anticipated, the company was liable.

APPEAL from district court, Jefferson county.

O'Brien & John for appellant.

Tom J. Russell for appellee.

GAINES, J.—The first assignment of error, to the effect that the court erred in overruling defendant's general demurrer to plaintiff's petition, is not well taken. It was not necessary that the petition should allege negligence or want of skill on part of the defendant company in the construction of its railway in these very words. It is averred that the effect of the construction of defendant's road was that its grade obstructed the drainage of the surface-water over certain sections of land, subject to overflow (including plaintiff's), so as to cause it to stand from one to six weeks longer than it would have otherwise done under similar circumstances. If this was a fact, then the defendant company did not comply with the statute, which provided that "in no case shall any railroad company construct a road-bed without first constructing the necessary culverts or sluices, as the natural lay of the land requires, for the necessary drainage thereof." Rev. St. art. 4171. Therefore the necessary deduction from the averments of the petition is that the company did not exercise the proper degree of care and skill in the construction of its roadbed. Some of the allegations of damages contained in the petition should have been stricken out, if a special demurrer had been interposed. But the value of the crops at the time of their alleged destruction is averred in detail, and this is sufficient in that regard to save the pleading upon general demurrer.

The other assignments of error we need not consider in detail. They call in question the sufficiency of the evidence to sustain the verdict in the following particulars: It is claimed (1) that the evidence does not show that the losses of plaintiff were the proximate result of the railroad embankment; (2) that the evidence showed that the roadbed was carefully and skilfully constructed; and (3) that the overflow was of such extraordinary character that defendant was not liable, although but for the embankment the damage would not have occurred.

But, in the first place, there was the evidence of more than one witness going to show that, before the railroad was built, the water on the west side had always run off in five or six days, but that on both of the occasions in question the water stood on that side of its track for four or five weeks, and on the same times went down on the east side of the track in a much shorter time. The floods of May and June, 1884, and of January and February, 1885, immediately caused the destruction of the crops for which the suit was brought. In the second place, we think the jury were warranted in finding from the testimony that the railroad embankment caused the water to remain over the land west of it a much longer time than it had ever remained before. This showed that the road was not built as the law required, and was in itself sufficient evidence of negligent and faulty construction. Under the testimony adduced as to the effects of the

EVIDENCE AS TO
SUFFICIENCY OF
CULVERT.

embankment upon the water, they were authorized to disregard the testimony of the engineer that they had constructed the road in a skilful manner. If they believe plaintiff's witnesses, they did not err in permitting the facts sworn to by them to prevail over the opinion of the engineers.

The question of the defendant's exemption from liability, by reason of the extraordinary character of the overflow, we need not here discuss. A similar question was considered in the opinion in the case of the Gulf, C. & S. F. R. Co. *v. Pomeroy*, 3 S. W. Rep. 722 (this day delivered), and we think the conclusion there reached decisive of the point now before us. The evidence in the case tended to show that a large scope of country near the town of Sabine Pass, adjoining which plaintiff's land was situated, was subject to overflow by water coming from the north and west. There was evidence going to show that similar floods had occurred not many years before the railroad was built, and the fact that the two overflows in question occurred in less than nine months of each other tends very strongly to the conclusion that they were not so extraordinary and unusual that they might not reasonably have been expected to occur. *Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512.

EXTRAORDINARY
FLOOD — COM-
PANY'S LIABIL-
ITY.

There is a proposition in the brief of appellant setting up that the damages are excessive. This is nowhere specifically assigned as error. The damages found by the jury were clearly excessive, but the excess has been remitted. In the absence of a distinct assignment upon the point, we do not feel called upon to consider whether this is a case in which a remittitur was proper in order to correct the vice of an excessive verdict.

There being no error in the judgment, it is affirmed.

Overflow—Liability of Company—Construction of Insufficient Culverts.—

See *St. Louis, etc., R. Co., v. Haires*, 26 Am. & Eng. R. R. Cas. 608; note to *Valley R. Co. v. Franz*, 25 Am. & Eng. R. R. Cas. 279; *Louisville, etc., R. Co. v. Hays*, 14 Ib. 284; *Drake v. Chicago, etc., R. Co.*, 17 Ib. 45; *Little Rock, etc., R. Co. v. Chapman*, 17 Ib. 51; *Gulf, etc., R. Co. v. Helsey*, 20 Ib. 89; *Chicago, etc., R. Co. v. Benson*, 20 Ib. 96; *Texas, etc., R. Co. v. Sutor*, 11 Ib. 506; *Wayland v. St. Louis, etc., R. Co.*, 11 Ib. 508; *Union Trust Co. v. Cuppy*, 11 Ib. 562; *Davidson v. Oregon, etc., R. Co.*, 14 Ib. 267; *Oarsler v. Balt, etc., R. Co.*, 14 Ib. 297; *Bryant v. Bigelow Carpet Co.*, 7 Ib. 72.

Company is Not Bound to Provide against Extraordinary Floods.—See *Int. & G. N. R. Co. v. Halloren*, 3 Am. & Eng. R. R. Cas. 343; *Baltimore, etc., R. Co. v. Sulphur Springs, etc., S. D.*, 2 Am. & Eng. R. R. Cas. 166. In *Pittsburg, etc., R. Co. v. Gilliland*, 56 Pa. St. 445, the duty of the company in such cases is laid down as follows: "In the present case, if the culvert was so unskilfully and negligently constructed as to be insufficient to vent the ordinary high water of the stream, the railroad company building it would have been liable for the injury thereby caused. The apparent facts indicate the duty. The stream though small must find a vent, or overflow the adjacent land and undermine the railroad. Its size, the character of the channel, and the declivity of the circumjacent territory which forms the

watershed, indicated the probable quantity of water to be passed through. Proper engineering skill should observe these circumstances, and supply the means of avoiding the injury which would result from locking up the natural flow, or obstructing its passage so as to cause a reflux in times of *ordinary* high water. Beyond this prudent circumspection cannot be expected to look, and there is therefore no liability for extraordinary floods,—those unexpected visitations whose comings are not foreshadowed by the usual course of nature, and must be laid to the account of Providence, whose dealings, though they may afflict, wrong no one.”

See also next case, referred to in the above opinion.

GULF, COLORADO AND SANTA FE R. Co.

v.

POMEROY.

(*Advance Case, Texas. March 15, 1887.*)

THE plaintiff's crops on his land adjacent to the track of the defendant railroad company were injured by an overflow of a neighboring river, caused by insufficient culverts in the defendant's railroad embankment. The overflow was an unusual one, but it was shown that, in 1833, 1843, and 1852 similar ones occurred. In an action to recover damages for such injury, *held*, that if the overflow was of such an extraordinary character that the engineers in the construction of the embankment and culvert could not reasonably have been expected to have anticipated and provided against it, then the railroad company was not liable; but if, although the overflow was extraordinary, it might reasonably have been anticipated and provided against, the railroad was liable; and that the occurrence of the previous heavy overflows was sufficient evidence to warrant the jury in finding that the one in question ought reasonably to have been anticipated.

APPEAL from Galveston county.

This is a suit to recover damages to plaintiff's (appellee's) crops, alleged to have been caused by insufficient culverts in defendant's (appellant's) railroad embankment, which he alleged held or forced the waters of the Brazos river, coming over its banks in an overflow of the river, in June, 1885, at a point near Thompson's switch, in Fort Bend county, onto his (plaintiff's) land and crops. Judgment for plaintiff, and defendant appeals.

Ballinger, Mott & Terry for appellant.

Wheeler & Rhodes for appellee.

GAINES, J.—We think the exceptions to the petition upon the ground that the land upon which plaintiff's crops were growing at the time of their alleged destruction is not sufficiently described, were properly overruled. The allegations in question are that
FACTS. plaintiff and one Renschlow were “engaged in farming and cultivating cotton, corn, and other produce on a certain tract

of land near the Brazos river, and in said county of Fort Bend, and near about half a mile northeast of Thompson's switch, in said county; said tract of land being well known, and marked on the map of said county as the 'Old Thompson Place' or 'tract,' and owned by Yandell Ferris, of said county, and by plaintiff leased from said Yandell Ferris, containing about fifty acres, a portion fronting on the Brazos river, and the whole of said tract lying and being situated between the said river and the railroad track and railroad bed of the said defendant company,—said track being about a mile distant, and running parallel with said river." Further on it is alleged that the plaintiff was cultivating certain crops on his own account on the same tract of land, and that he had rented to one Geohan "the balance of said tract, to wit, about thirty-five acres of land; the same being near and adjoining the land cultivated by plaintiff and the said Renschlow, hereinbefore fully described. Plaintiff having purchased the claims of his partner and tenant, sued to recover damages for the loss of the crops upon all the land so described. The description is certainly sufficient to apprise the defendant of the locality of the crops, the destruction of which constituted the foundation of the action, and to identify them with reasonable certainty. It is also definite enough to enable defendant to plead the judgment in bar of another suit without the aid of parol evidence, which may be resorted to in a proper case under that plea, in order to show the identity of the subject-matter of the two actions.

The second and third assignments of error are directed to the charge of the court, and are as follows:

"(2) The court erred in charging the jury: 'If the overflow was of such an extraordinary character that railroad engineers of ordinary care, prudence, and caution, in the construction of the embankment, could not be reasonably expected to anticipate it, then the defendant company would not be liable for damages; but if you believe from the evidence that, although the overflow was extraordinary, yet that such an overflow could have been reasonably anticipated by railroad engineers of ordinary care, prudence, and caution, and, in the construction of the railroad embankment for its roadbed, could have constructed it so as not to have caused damage to plaintiff's crop, then the defendant company would be liable,'—because under no circumstances was defendant liable for an extraordinary overflow, and because the charge made defendant's liability depend on the bare fact as to whether the embankment could have been so constructed as to have avoided the damage, without regard as to whether such construction could have been reasonably required.

ASSIGNMENTS OF
ERROR.

"(3) The court erred in not more clearly defining to the jury what is meant by an extraordinary overflow, and erred in not giving in its charge some guide to the jury to determine whether or

not the overflow was extraordinary; and erred in refusing to give the third special charge asked by the defendant, because the same announces the correct rule for determining whether the overflow was of such extraordinary character as not to require defendant to guard against it."

The whole charge, taken together, is favorable to the defendant; and the extract complained of in the above assignments we think forcibly presented the law of the case upon the proposition contained in it. The ground upon which a railroad company or

LIABILITY OF
RAILROAD FOR
UNUSUAL FLOOD.
--QUESTIONS PRE-
SENTED.

other corporation is exonerated from liability in certain cases of this character is not, as we may be led to believe by some expressions in the opinions of the courts, that a prudent man under like circumstances would not have provided against the danger. A careful person, in constructing a like improvement which endangered his own property, might prefer to take the risk of a loss from either ordinary or extraordinary floods to incurring the certain expense necessary to make an effectual provision against them. But this rule certainly would not do when the property of others is subjected to the risk of destruction or damage. In our opinion, the true test is: Considering all the circumstances, and especially the history of the stream, would a prudent man have anticipated such a flood as caused the damage? If not, the loss will be deemed the act of God, for which no action arises. The statute requires railroad companies, in constructing their embankments, to provide such culverts and sluices as may be demanded by the natural lay of the land for its necessary drainage. Rev. St. art. 4171. We construe this to mean that provision need not be made for such extraordinary floods as could not have reasonably been foreseen; but such as may have been reasonably anticipated must be guarded against, without reference to the frequency of their occurrence. Knowing that an extraordinary inundation has occurred more than once, and for that reason that it may occur again, a party who has constructed a work which obstructs its outflow, and causes it to submerge the property of another, to his damage, will not be permitted to defend against the wrong by setting up the fact that the floods not provided for have occurred only at long intervals. In his opinion in the case of *Mayor of New York v. Bailey*, 2 Denio, 433, Chancellor Walworth says: "The dam should therefore have been constructed in such a manner as to resist such extraordinary floods as might have been reasonably expected occasionally to occur; and if the flood of 1841 was not much higher than any which had been known to occur upon the stream within the memory of man, those who had charge of the construction of the dam should have anticipated such a flood, and should have provided a dam that would have been sufficient to resist the operation of that flood." These extracts indicate the correct rule in these cases. If,

when the work is being constructed, extraordinary inundations have occurred within the memory of men then living, their recurrence should be anticipated, and provision made against the danger likely to result from the works should a recurrence of the flood take place. For the reasons stated we think there is nothing in the charge of which the appellant has the right to complain.

The sixth assignment of error is to the effect that "the verdict is against the evidence, because the flood was extraordinary, and one that could not have been reasonably anticipated; it appearing from the evidence that no flood of similar extent had occurred before for a period of thirty-two (32) years." There was ample evidence to show that there were similar overflows in the Brazos river in 1833, in 1843, and in 1852. From what we have said it is apparent that, in our opinion, this was sufficient testimony to warrant the jury in finding that the flood in question ought reasonably to have been anticipated by defendant's agents when they constructed its road, and to authorize them to hold defendant responsible to plaintiff for any loss which resulted to him from the combined action of such embankment and flood. But it appeared further in evidence in the case that when the flood was about at its highest point, and the danger to plaintiff's crop was apparent, the defendant company, in order to protect its track, raised its embankment, which obstructed the outflow, and narrowed the culverts with sand-bags, and thereby protracted the inundation which caused the damage. The evidence shows that this contributed to the injury. However extraordinary the flood might have been, the defendant, after seeing its effect, certainly had no right to obstruct its outflow, to plaintiff's damage. It would seem, therefore, that defendant has no cause to complain of the judgment in the case.

We find no error in the proceedings of the court below, and the judgment is therefore affirmed.

Company Not Liable for Extraordinary Overflow.—See *Sabine, etc., R. Co. v. Hadnot*, *supra*, p. 197.

GALVESTON, HOUSTON AND SAN ANTONIO R. Co.

v.

WARE.

(*Advance Case, Texas. April 15, 1887.*)

Suit was brought by the plaintiff to recover damages for injuries to his property caused by the improper building of the defendant company's rail-

way. It was shown that the plaintiff's house was greatly damaged and weakened by a flow of water, so that, over seven months afterwards, it was destroyed by storm, with furniture and stores therein. *Held*, that the destruction of the house, furniture, and stores was not a proximate result of the injury, and there can be no recovery therefor. The true measure of damages is the cost of the repairs rendered necessary by the overflow, and the inconvenience the necessity for them caused.

APPEAL from district court, Kinney county.

Solon Stewart for appellant.

J. A. Ware for appellee.

STAYTON, J.—There is nothing in the facts of this case on which to base a claim for exemplary damages; and, as none other than actual damages were awarded by the jury, no injury resulted from overruling the demurrer to so much of the petition as attempted to state facts on which to found a claim for exemplary damages. The language used, however, in that part of the petition, was improper, and should be stricken out.

The application, which was for a first continuance, was in strict compliance with the statute, showed legal diligence, and should have been granted on account of the absence of the witness.

It was claimed by the appellee, among other matters, that a house on his lot was greatly injured on September 15, 1883, by a flow of water upon the lot, caused by the improper construction of appellant's railway; that he caused it to be repaired, and had in it on April 30, 1884, furniture and stores, which, with the house, were on that day destroyed by a storm. This destruction of the house he attributed to its weakened condition resulting from the overflow, which occurred more than seven months before. Evidence to prove the destruction of the house, furniture, and goods was objected to, but admitted. If the house was injured through the negligence of the appellant, then the appellee was entitled to recover damages which directly or necessarily resulted from such injury, but he was not entitled to recover for an injury resulting from another cause, which the appellant in no way participated in bringing about. If the house was rendered insecure by the overflow, and this resulted from the negligence of the appellant, it was negligence in the appellee to place furniture and stores in it, and the injury resulting from his own act cannot entitle him to compensation. The right to recover for any injury to the house caused by the negligence of the appellant, and the measure of damages, were fixed by facts existing long before the storm came which destroyed it; and the appellee would have been entitled to recover such sum as would have been necessary to put the house in as good condition as it was before the overflow, with reasonable compensation for any interruption in its use while in the course of repair, or to the difference between the value of the house before

and after it was injured, with compensation for any deprivation of its use necessarily suffered while it was being repaired. This was the extent of the right of the appellee to recover for any injury to the house which may have been caused by the negligence of the appellant. The injury from the storm was neither the ordinary nor necessary result of the negligence of the appellant complained of. The evidence objected to should have been excluded. 1 Suth. Dam. 56.

The other assignments of error relate to matters which will not probably occur on another trial, and need not be considered.

For the errors noticed the judgment will be reversed, and the cause remanded.

OWENS

v.

MISSOURI PACIFIC R. Co.

(*Advance Case, Texas. April 22, 1887.*)

After the construction of the embankment of the defendant road, the plaintiff's land was overflowed and depreciated in value. In an action to recover damages for the injury alleged to have been thus caused, the court instructed the jury that the measure of damages is "the difference between the value of the plaintiff's land before the construction of said embankment, and the value of the same immediately after said damage, if any was caused by said defendant." The court also instructed the jury that the defendant was not bound to construct sluices and water-ways in places where the water did not naturally flow out, an instruction having previously been given that, if the work of the defendant caused the overflow, he was not entitled to recover. Certain witnesses certified that the standing of the water on the land in question was wholly caused by the embankment of the defendant, while other witnesses testified that the embankment did not affect the flow of the waters from it. A verdict was rendered for the plaintiff for a small amount. *Held:*

1. That the instruction as to the measure of damages was not erroneous.
2. That the instruction as to the construction of sluices and water-ways was not erroneous; such instruction would not prevent the jury from considering the question of the obstruction of the outlets of the pond which covered the land in question.
3. That the verdict would not be set aside because the evidence would have sustained a verdict for a much larger sum; nor can it be said that the jury found against the evidence on the question of damages, considering the evidence concerning the cause of the standing water.

It is not error for the court, upon the jury reporting that they cannot agree, to say to the jury that there has been a mis-trial at a former term in the cause, and that the business of the court, and the interests of the country, made it important for them to agree, if it could be done; and any exception to such action of the trial court, in order to be considered upon

appeal, must be taken at the time, and a bill of exceptions prepared, tendered to, and signed by the judge, after having been submitted to the opposing attorney as required by statute. The mere statement of the judge of these facts in the record, although written by him and signed officially, cannot be received as its substitute.

APPEAL from McLennan county.

Clark & Dyer and *Herring & Kelley* for appellant.

Foster & Wilkinson for appellee.

GAINES, J.—This suit was brought by appellant against appellee to recover damages to appellant's land, alleged to have been caused by an embankment erected by appellee. Appellant obtained in the court below a verdict and judgment for \$100; and because, as he claims, the damages are insufficient, he now appeals to this court. That after the construction of appellee's road and embankment, the land of appellant was overflowed and greatly depreciated in value there can be no doubt. But the stress of the case was upon the issue whether the continuous overflow, which was proved, was the result of the embankment, or was caused by an unusual succession of heavy rains. Incident to this was the further question: If the overflow was affected at all by the embankment, to what extent was it increased by that obstruction? A large number of witnesses were examined upon these questions by both parties, and the evidence is conflicting. It was peculiarly within the province of the jury to weigh the evidence, under these circumstances, and to determine the issues. Their verdict cannot be disturbed unless for errors in the proceedings of the court.

We will therefore consider the assignments in order. The first and second are presented together, and are as follows: "(1) The court erred in the fifth paragraph of the charge to the jury, wherein the measure of damages is stated to be 'the difference, if any, between the value of plaintiff's land before the construction of said embankment and the value of the same immediately after said damage, if any, was caused by said defendant.' (2) The court erred in not giving to the jury the special charge as to the measure of damages, which would have corrected the error complained of in the preceding assignment, which charge was as follows: 'If the jury should find, under charges heretofore given, that the plaintiff has suffered damages by the erection and maintenance of said railway embankment for which he would otherwise be entitled to recover of the Missouri Pacific R. Co., under the law and evidence, by reason of said embankment being the original cause of the injury, the fact, if it be a fact, that in the present condition of the pond, and the ground adjacent thereto, the removal of the embankment originally erected would not cause the water to flow off, cannot diminish,

QUESTIONS PRESENTED.

INSTRUCTIONS AS TO MEASURE OF DAMAGE CONSIDERED.

impair, or defeat the right of the plaintiff to recover. If the jury find for the plaintiff, they will find for him such damages as have been caused by the defendant to this time, and the measure of damages is the difference in value of the land at the erection of the embankment and its present value, in the absence of any evidence that the value of said land has been changed or diminished by other causes."

It is to be noted that the second assignment is not sustained by the record. What is called therein the special charge was embraced in two separate instructions asked by the appellant. The record shows that so much of the instruction quoted as is embraced in the first sentence was asked as a separate charge, and was given. That which is embraced in the second sentence was separately requested also, but was refused. Ordinarily the measure of damages resulting from overflows caused by the construction of embankments is the loss resulting from each successive flood; but in this case it was alleged that the value of the land was permanently impaired by the destruction of a valuable pasture, and the damages claimed were the deterioration in the price of the property. So far as the record discloses, no question was made upon either side as to this being the proper measure of plaintiff's recovery, if he were entitled to recover at all. The appellant's proposition, under the assignment, is that the portion of the charge complained of in the first assignment "took from the jury the consideration of damage that may have resulted to plaintiff by reason of *débris* being deposited in the water-ways, outlets, and sluices of the pond, while the land was for a long time flooded, which damage would not have resulted immediately after the overflow, but would have been the result of continuous deposit of sediment after the lapse of time from the 13th of December, 1881, until July, 1883, and later."

We do not think the instruction obnoxious to the objection made to it in this proposition. It does not charge the jury that the measure of damages is the difference in the value of the land before the embankment was made, and its value immediately after the first overflow that followed, but that it is the difference in value before the construction was made and immediately after the damage that resulted from defendant's act. This, we think, clearly means the difference between the value immediately before the erection and its value after all the damage caused by it had been done. This was correct, and, in our judgment, as applicable to the evidence adduced, was not calculated to mislead the jury. The fifth special charge asked by appellant had been substantially given in the instruction we have had under consideration, and therefore it was not error to refuse it.

The fifth assignment of error complains of the action of the court in telling the jury, when they reported they could not agree,

that there had been a mis-trial at a former term in this cause, and that the business of the court, and the interests of the country, made it important for them to agree, if it could be done. But to this action of the court no exception was taken at the time, and no bill of exceptions prepared, tendered to, and signed by the judge, after having been submitted by him to the opposing attorneys, as the statute requires. There appears in the record a statement of the fact that the judge used the language to the jury which is complained of in the assignment, and under the circumstances therein set forth; but we think this cannot be considered. In order to subject the action of the trial court to reversion on appeal, it must be excepted to at the time. The office of a bill of exceptions is to show the proceedings of the court which do not otherwise appear of record, and the mode of its authentication being provided by law, the mere statement by the judge, although written by him and signed officially, cannot be received as its substitute.

The fifth and sixth assignments of error are submitted with the same statement, and may be considered together. They are as follows: "(4) The verdict of the jury is manifestly a compromise verdict, and is contrary to law and not warranted by the evidence. (5) The verdict is contrary to law and evidence in this: It finds one hundred dollars damages for plaintiff, thereby admitting his cause of action as alleged, when there was no conflict of evidence as to the measure of damage; and the very least amount of damages, as shown by the evidence, without anything at all to the contrary, is \$13,000. So the jury should have found a verdict, under the law and evidence, for this amount; and in this, the verdict is entirely without and not supported by any evidence, and is manifestly contrary to the law as charged by the court."

The evidence would doubtless have warranted a verdict for plaintiff for damages to a much greater amount than that found by the jury. It would also have sustained a verdict for the defendant. There were witnesses who testified that the standing of the water over the land, and the consequent destruction of the pasture, were wholly caused by defendant's embankment. There were about as many who gave evidence that they had known the land for many years, and that the embankment did not affect the flow of the waters from it. There were still others from whose testimony the jury were warranted in concluding that the embankment did somewhat affect the drainage of the land, but that the damage was in the main to be attributed to natural causes, and that the construction of the work contributed to it only to a very slight extent. A number of witnesses having sworn that the overflow was caused by the embankment, and others equally credible having

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AMOUNT OF DAM-
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sworn that it was not, it is not surprising that the jury concluded that the truth lay between the two extremes, and found that the work did affect the floods, but only to a very limited degree. Such being the case, we cannot say that the jury found against the evidence upon the question of damages.

The objection that the finding of the jury is a compromise verdict is not well taken. We presume that but few verdicts are returned giving damages for a tort in which the amount is not the result of a compromise between the members of the jury.

The sixth assignment of error is that "the court erred in the last paragraph of its charge to the jury, which is as follows: 'You are further instructed that the law does not require the construction of sluices or culverts for the drainage of INSTRUCTIONS AS TO CONSTRUCTION OF SLUICES AND CULVERTS. and, except that which naturally lays so that the water thereon will be naturally drained by the construction of such culverts or sluices; and if the jury find from the evidence that the water standing on Dry pond, at its present height, has no natural connection with or flow to the embankment at the north end of the railroad through plaintiff's lands, the defendant would not, in such cases, be required to construct a culvert or sluice under such embankment through plaintiff's land, at said north end, for the drainage of the water standing in said Dry pond at that point; unless you also find that said Dry pond is disconnected with said embankment at said point by the accumulation of *débris* between said Dry pond and said embankment, caused by the construction of the same, thus preventing the natural flow of said water to said drainage, if any.'" Record, 200.

This charge is not liable to the criticism made upon it in the proposition under the assignment. It is clearly not upon the weight of the evidence, nor do we see that it was calculated to mislead the jury. It does not exclude from the consideration of the jury the question of the obstruction of the outlets in the southern portion of the pond, as appellant complains. The jury are merely told, in effect, that, if the water did not naturally flow out at the north end, defendant was not bound to construct waterways there, except in case *débris* thrown up by the embankment had dammed the natural outlet at that point. The jury had already been instructed, in substance, that, if the work caused the overflow, plaintiff was entitled to recover, and the instruction now under consideration did not preclude them from finding that there may have been an outlet at the southern part of the pond which the embankment had obstructed.

We find no error in the judgment, and it is affirmed.

Measure of Damages for the Overflow of Land.—See note to *Lammeland v. St. Paul, etc., R. Co.*, 26 Am. & Eng. R. R. Cas. 598; Note to *Valley R. Co. v. Frantz*, 25 Ib. 279-280; *Chicago, etc., R. Co. v. Benson*, 20 Ib. 96;

30 A. & E. R. Cas.—14

Hull v. Chicago, etc., R. Co., 20 Ib. 341; Quinn v. Chicago, etc., R. Co., 17 Ib. 63; Hammond v. Port Royal, etc., R. Co., 11 Ib. 352; Anderson v. Cincinnati Southern R. Co., 14 Ib. 280 and note; Van Arsdall v. Burlington, C. & N. R. Co. 5 Ib. 53.

LYMAN

v.

CENTRAL VERMONT R. Co.

(*Advance Case, Vermont. August 15, 1887.*)

The defendant, the receiver of another railroad, with the consent of the court of chancery, leased and operated still another railroad, not in the hands of the court. The plaintiff brought suit against the receiver to recover damages for the death of her husband on the leased road, caused by the negligence of the defendant in not providing a safe track. The defendant set up its receivership as a defence, and that leave to prosecute had not been obtained from the court of chancery. *Held:*

1. That the court of chancery can only interfere to protect its officers by writs of injunction, directed against the party, restraining him from further prosecuting the action, and not against the law court or any of its officers; hence it was no jurisdictional bar to the suit that leave to prosecute had not first been obtained.

2. That the receiver stood as to the business of the leased road, not as a receiver in the sense that he was in that business an officer of the court, but as a party *sui juris*, acting as his own principal, and upon his own responsibility.

ACTION on the case. Heard on demurrer, September term, 1884, Rutland county, Veazey, J., presiding. Judgment *pro forma* that the demurrer to the defendant's special plea be sustained, and that the plea is insufficient. Affirmed.

The declaration was, in part, as follows:

"For that the defendant at, to wit, Shoreham, in the county of Addison, was the lessee of a certain railroad, known as the Addison Railroad, passing through said town, and as such lessee was and had long been operating and managing the same, and running locomotives and cars thereon, from, etc.; and the plaintiff's husband and intestate, Daniel F. S. Lyman, was an employee of the defendant, as master and tender of the drawbridge, forming a part of said Addison Railroad, over Lake Champlain; and as defendant's employee, in the discharge of his duty as its servant, frequently passed over said road, on his way to Rutland, in the county of Rutland, aforesaid, and return, upon the defendant's locomotives and cars, and thereupon it became and was the duty of the defendant to provide a suitable, safe, and sufficient roadbed and track, and to use due and proper skill, care and diligence in pro-

viding a suitable, safe, and sufficient roadway for the passage of said locomotives and cars to and fro over said railroad.

"Yet the said defendant, disregarding and neglecting its duty aforesaid, did not then and there provide a suitable, safe, and sufficient roadbed and track for the passage of said locomotives and cars to and fro over said railroad; but, on the contrary thereof, did negligently and carelessly provide a roadbed and track which was insufficient, unsuitable, and unsafe for the passage of locomotives and cars over the same, whereby and by means of the unsuitable, insufficient, and unsafe condition of said roadbed and track, a certain locomotive of the defendant, whereon said intestate was then and there riding, said intestate having got upon said locomotive at a preceding stopping-place of trains running over said road, for the purpose of being able to attend to his duties at said draw-bridge without delay, when the same should be reached by said locomotive, according to the course of his said employment and in pursuance of his duties therein, was thrown from the track and thrown down the embankment of said railroad and thereby the said intestate was then and there instantly killed; that said intestate resided in Rutland, in said county of Rutland, and left surviving him a widow, the plaintiff, Luvia A. Lyman, and four children; and that said children constitute the next of kin of said intestate. Whereby the defendant became liable to an action for damages by force of the statute in such case made and provided, at suit of the plaintiff, as administratrix as aforesaid, for her benefit as widow of said intestate, and for the benefit of his said next of kin, to the damage of," etc.

Pleas, general issue:

"And for a further plea in this behalf the said defendant, by leave of court, etc., says that the said plaintiff ought not to have or maintain her aforesaid action thereof against the said defendant, because the defendant saith that at the time of the pretended injury in and by said declaration complained of, the said defendant was not in the possession of the railroad, engines, cars, or property in said declaration mentioned, nor controlling the same, nor the agents, servants, or employees engaged or employed on or about the same; but the defendant avers that, at the time aforesaid, and for a long time before and after, to wit, from the 1st day of January, 1874, continuously, down to the time of the beginning of this suit, said railroad, engines, cars, and property were in the sole and exclusive possession, management, and control, and each and all of the said agents, servants, and employees were in the sole and exclusive employment and control of the Central Vermont R. Co. as receivers and managers of the Vermont Central and Vermont & Canada railroads, and property connected with and appertaining thereto, under and by virtue of a decree or order of the honorable

the court of chancery, within and for the county of Franklin, and State of Vermont, rendered on the 21st day of June, 1873, in a cause then pending in said court of chancery, entitled Vermont & Canada R. Co. *et al.* v. Vermont Central R. Co. *et al.*, and not otherwise.

"And this the said defendant is ready to verify. Wherefore the said defendant prays judgment, if the said plaintiff ought to have or maintain her aforesaid action thereof against the said defendant," etc.

Noble & Smith, Stephen E. Royce, and E. J. Ormsbee for defendant.

F. C. Swinington for plaintiff.

POWERS, J.—This is an action on the case for negligence in the operation of the Addison Railroad by the defendant, as lessee, whereby the plaintiff's intestate, an employee of the defendant, was killed.

The defendant filed the plea of the general issue, to which the *similiter* was answered, and a special plea to which there was a general demurrer.

The question for consideration arises upon the demurrer.

THE SUBSTANCE OF THIS PLEA IS THAT THE DEFENDANT WAS NOT AT THE
QUESTIONS OF PLEADING. time when, etc., in the possession or control of said railroad and the rolling-stock of the same, nor in control of the servants and employees operating the same, but that the Central Vermont R. Co., as receivers and managers of the Vermont Central and Vermont & Canada railroads, and property connected therewith and appertaining thereto, under and by virtue of a decree or order of the court of chancery within and for Franklin County, rendered June 21, 1873, in a cause then pending in said court, entitled Vermont & Canada R. Co. v. Vermont Central R. Co. *et al.*, was at the time when, etc., in the sole and exclusive possession, management, and control of said railroad, its rolling-stock, and the servants operating the same.

There is some attempt made in the defendant's brief to claim that the defendant named in the declaration is a different person from the party set up as receiver. But if this refinement were possible it would not aid the defendant; as in such case the plea would amount to the general issue, and this would acknowledge the jurisdiction of the court.

But we think the terms of the plea should have a reasonable construction; and its natural import is that the defendant named in the writ as a party primarily responsible, in fact, was a mere representative not personally answerable; as if A be sued generally and he pleads that he was administrator.

It is to be noticed that the plea does not deny the allegation in the declaration that the defendant was the lessee of the Addison

road, and was operating such road as lessee, except argumentatively, which is not enough. The want of a denial is an admission of the fact alleged in the declaration that the defendant was such lessee and operator of the road as charged. "Every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse." Steph. Pl. 217.

This plea, upon the defendant's theory, is a plea to the jurisdiction. It attempts to set up reasons why the Rutland county court has not jurisdiction over the defendant. In this posture the plea is too late in time. It was filed with a plea of the general issue, on which issue has been joined, whereas a plea to the jurisdiction is "the first plea in the regular order of pleading on the part of the defendant." Gould. Pl. chap. 5, § 13.

It is analogous to a plea in abatement; and if the defendant files any other plea, like the general issue, it is waived; as a plea of the general issue confesses jurisdiction. Gould. Pl. chap. 2, § 37.

As a plea to the jurisdiction, it is defective in that it professes to answer the cause of action as a bar, and concludes with a prayer for judgment if the plaintiff ought to have or maintain his action; whereas the matter set up does not meet the cause of action. The defendant does not attempt to say the plaintiff has no right to sue anywhere, but that she cannot sue where she attempts to. This is the scope and theory of the plea, as the defendant argues his case, though it is manifest that no sufficient allegations appear to warrant such claim. Giving to the plea all that the defendant claims for it, it amounts to this: The cause of action must be referred to the court appointing the receiver for trial and determination.

The plea does not aver that the Addison Railroad, and the rolling-stock used thereon, is parcel of the receivership estate in the hands of the Franklin county court of chancery for administration through its receivers and managers, nor does it aver any prohibition upon the plaintiff's proceeding with her action in the Rutland county court, but rests upon the mere proposition that the defendant has been appointed receiver of other railroads impounded in a cause depending in another court, and as such receiver is in possession and control of the Addison road. All this is consistent with the allegation in the declaration that the defendant is the lessee and operator of the Addison road, and such allegation is to be taken as true.

The same person who was the receiver of the other roads was the lessee of the Addison road, but this did not make the Addison road receivership property, nor expose it to administration as receivership estate by the Franklin county court of chancery. The receiver acquired it by contract, not by decree of the court of chancery.

POSITION OF RE-
CEIVER LEASING
ANOTHER ROAD.

If the court of chancery consented that its receiver might step

outside his proper functions as receiver of the Vermont & Canada and Vermont Central railroads, and engage as a lessee in business foreign to the administration of the property in the hands of the court, he stands, as to such business and as to all persons employed by him or having business relations with him in the conduct of such foreign business, not as a receiver in the sense that he is therein an officer of the court, but as a party *sui juris*, acting as his own principal and upon his own responsibility. The order of the court, if any, sanctioning his engagement is such outside business, is available to him in the settlement of his accounts as receiver of the roads in the hands of the court, but not as the gauge of his responsibility to third persons dealing with him.

The case of *Kain v. Smith*, 80 N. Y. 458, s.c., 2 Am. & Eng. R. R. Cas. 545, is a well-considered case, and directly in point. There, as here, the plaintiff was an employee of the defendant, who was the lessee of the Ogdensburg & Lake Champlain Railroad, and a receiver of the Canada and Central railroads. The plaintiff was injured in the line of duty by defective machinery used in the operation of the leased road. The declaration charged the defendants as carriers of passengers and freight, and having in use in such business the defective machinery occasioning the plaintiff's injury. The defence set up there was substantially that urged here. The court, speaking of the defendant's relation to the injury, says, page 470: "He was not in possession of the Ogdensburg & Lake Champlain Railroad as an officer of any court, or by its authority. The court itself never had possession or control over it. He went into possession with his associates by virtue of a contract. He was permitted, not directed, by the court to make it, and this permission will serve him upon his accounting for his management of the Vermont Central road." Again: "Outside the State he stands as an individual liable for his negligence, whether he acts personally or through agents, alone or in company with others. He cannot be shielded by a description of his office or a declaration that he is acting in an official character."

If the defendant would be liable upon the facts in New York, he clearly would be in any jurisdiction."

But, pursuing the line of argument taken at the hearing before us, and giving the plea the scope it is claimed to have, we think that if the defendant had been in fact a receiver instead of a lessee of the Addison road, operating it under the orders of the court of chancery, then, having assumed the character of a common carrier of freight and passengers, it would be answerable for its torts in the management of the road to the same extent that the Addison R. Co. would have been, in the same operation, to its employees, as well as third persons.

This court is already committed to this doctrine. In *Sprague v.*

RECEIVER IS RESPONSIBLE FOR TORTS IN MANAGEMENT OF ROAD — AUTHORITIES REVIEWED.

Smith, 29 Vt. 421, the defendant was sued for an injury to a passenger. The defendant was operating the road as trustee for the bondholders. Defence was made that the trustee could not be made liable personally. Chief Justice Redfield, for the court, said: "And we can see no reason why the defendants are not liable to the same extent as the company would have been, and upon similar grounds to those upon which lessees or any others exercising the franchise of the company for the time must be; that is, that they are the ostensible parties who appear to the public to be exercising the franchise of the company. . . . The party having this independent control is in general liable for the acts of those under such control, whether of contract or tort."

In *Blumenthal v. Brainerd*, 38 Vt. 402, the defendants were sued for the loss of goods, two counts charging them as common carriers, and one as warehousemen. Defence was made that they were receivers in chancery of the railroads, in the operation of which the goods were lost, and that they were subject only to an accounting for the damage in that court, and could not be made liable in this action as common carriers. The court said: "A court of chancery will protect a person acting under its process or authority in the execution of a decree or decretal order, against suits at law, and will compel parties to apply to that court for relief. This protection is accorded by that court to its officers only on their application, and is granted by the chancellor in the exercise of his discretion; and it is to be presumed that it would be granted in any necessary or proper case for relief. 2 Story, Eq. Jur. (Redf. ed.) §§ 833 *a*, *b*, 891; 2 Dan. Ch. (Perkins' 3d Am. ed.) 1433. But we think that the mere fact that the defendants were acting as receivers under the appointment of the court of chancery cannot be recognized as a defence to a suit at law, for the breach of any obligation or duty which was fairly and voluntarily assumed by them, in matters of business conducted or carried on by them while acting as receivers."

In *Newell v. Smith*, 49 Vt. 255, the defendants were sued as common carriers for negligent delay in the transportation of goods. Defence was made that the defendants had connection only with goods as receivers in chancery. The court said: "The defendants were receivers in chancery of the property of the railroads employed in part in the transportation of the goods in question. In the operation and the management of the roads they sustained to persons dealing with them the character of common carriers. They at all times might invoke the aid of the court of chancery in any matter affecting their duty or liability under their trusteeship; waiving this, they are amenable in the common-law courts to actions for negligence as carriers."

The doctrine is not peculiar to this State. In *Paige v. Smith*, 99 Mass. 395, the same defence was made to a claim for loss of

goods entrusted to them as common carriers, and they were held liable. And in *Nichols v. Smith*, 115 Mass. 332, they were held in an action at law for the loss of wool in a depot under their control.

In *Ballou v. Farnum*, 9 Allen, 47, the plaintiff claimed damages for the negligence of a switchman on the Norfolk County Railroad. The defendants were trustees, and denied that they managed the road in a personal capacity; but the court held them personally liable, as they were in control, exercising the franchise of the corporation and controlling all the servants employed in the conduct of the business. On the same ground like decisions were made in *Barter v. Wheeler*, 49 N. H. 9, and *Lamphear v. Buckingham*, 33 Conn. 237. In *Kinney v. Crocker*, 18 Wis. 80, the defendant, a receiver, was sued for the negligence of his servant. The court said: "A court of equity will, on proper application, protect its own receiver, when the possession which he holds under the order of the court is sought to be disturbed;" and again: "But in all these cases it is not a question of jurisdiction in the courts of law, but only a question whether equity will exercise its own acknowledged jurisdiction of restraining suits at law, under such circumstances, and itself dispose of the matter involved. It follows that although a plaintiff in such case, desiring to prosecute a legal claim for damages against a receiver, might, in order to relieve himself from the liability to have his proceeding arrested by an exercise of its equitable jurisdiction, very properly obtain leave to prosecute; yet his failure to do so is no bar to the jurisdiction of the court of law, and no defence to an otherwise legal action in the trial. There can be no room to question this conclusion in all cases where there is no attempt to interfere with the actual possession of property which the receiver holds under the order of the court of chancery, but only an attempt to obtain a judgment at law in a claim for damages." In this case the action was brought against the receiver himself, and the question of jurisdiction was the exact point in judgment.

In *Allen v. Central R. Co.*, 42 Iowa, 683, suit was brought against the corporation whose property was in the hands of a receiver, for a trespass in ejecting a passenger from a train. Defence was made that the road was in the hands of a receiver. Some question was made whether the receiver after his appointment, a few days prior to the injury, had assumed control, but the trial court ruled that the action could not be maintained against the company unless leave to prosecute it had first been obtained from the court appointing the receiver, and this was the question for consideration in the supreme court. The court cites and quotes from *Kinney v. Crocker*, last above cited, and says: "This case, in our opinion, announces the correct doctrine."

That the objection is not a jurisdictional bar is generally, and it

may be added almost universally, held (*Angel v. Smith*, 9 Ves. 335; *Chautauqua County Bank v. Risley*, 19 N. Y. 369; *Camp v. Barney*, 4 Hun, 373; High Rec. § 398; cases *supra*; *Jones, R. R. Sec.* §§ 509, 510); and, on principle, why should the rule be otherwise? A receivership of a railroad is created, as in all other cases, as a provisional and *pro tempore* scheme for the preservation of the estate *pendente lite*. The scope of the receiver's duty is merely administrative. He is bound to manage the estate according to the rules of good husbandry,—good husbandry as applicable to the character of the estate he holds. If the property happens to be a railroad or other going concern, that for public reasons or its own conservation or advantage must be kept in operation, and the receiver, with or without the credentials of the court, deems it advisable to lease other railroads or engage in other ventures foreign to the scope of his administrative duty to the estate he holds, and so must have employees, must create extended business relations with third persons, and must expose the persons and property of others, strangers to the receivership estate, to peril and loss,—in short, in addition to the function conferred by the court, must take on another character, as lessee, carrier, etc.,—then it is easy to see that in all action had in such other and self-assumed character, he is outside his proper function as receiver and inside his character as master and manager of a business voluntarily assumed, personally managed, and, so far as third persons are affected, to all practical intents experimentally his own. If the sanction of the court be had in advance, this impresses no new character upon him or the business he assumes, but merely promises indemnity to the hazards of the venture. So long as he holds the property impounded by the receivership, and administers upon it for the purposes for which he was appointed, so far he is a receiver in the true essence and spirit of the office, and as such is entitled to absolute immunity and protection. When he takes on another character, without the scope of his appointment and outside the tenor of the decree creating the receivership, he necessarily takes upon himself the burdens, liabilities, and responsibilities incident to the business he assumes. And these liabilities are enforceable in the common-law courts.

So far there seems to be no conflict in the cases, and the case at bar is precisely within this rule. We do not say that in this class of cases a court of equity has no right, under any circumstances, to interfere with proceedings at law to enforce such voluntarily assumed liabilities; but the circumstances warranting such interference would necessarily be of an extraordinary character, and, conceivably, could hardly exist.

But in the other class of cases, where the receiver, in the management of the receivership estate itself, needs the intervention of the court under whose decree he acts, there is no question,

in proper cases, of its jurisdiction to act. In *Blumenthal's Case*, and *Newell's Case*, *supra*, and in *Morse v. Brainerd*, 41 Vt. 550, this court has affirmatively recognized this rule. But the intervention of the court of chancery is exercised only on the receiver's call for it (see cases above) and not at all upon any theory that the common-law court in which the receiver may be sued has no jurisdiction either over the subject-matter or the person of the receiver. "The court interferes on the principle of preventing a legal right from being enforced in an inequitable manner, or for an inequitable purpose." *Kerr*, Inj. 13.

And the only mode of interference is by action directed to the party, and not the court before whom the party is proceeding. The writ of injunction is the usual and proper process. "It is important to remember that in granting this relief equity does not pretend or assume to interfere with another court. The injunction is *in personam* merely. It is directed to the party, not to the court or the officers thereof. It is not, in other words, a writ of prohibition." *Bisph. Eq.* 459. "The writ of injunction by which proceedings at law are restrained, is not in the nature of a prohibition. In issuing injunctions courts of equity claim no supremacy over the ordinary tribunals. An injunction is addressed only to the individual, and is not directed to the court. Courts of equity in issuing the writ not only do not deny, but in fact admit, the jurisdiction of the ordinary tribunals." *Kerr*. Inj. 14.

So far it seems to be clear that the defence under this special plea does not go to the jurisdiction of the common-law court, but is of an equitable character that does not bar all remedy, but refers it to an equitable forum for enforcement.

So far as shown, *Barton v. Barbour*, 104 U. S. 126, s. c., 4 Am. & Eng. R. R. Cas. 1, is the only case that squarely upholds the defendant's contention. In all questions affecting rights under federal cognizance the decisions of the supreme court of the United States are controlling upon State courts. In other cases its decisions are entitled to the highest respect.

In *Barton v. Barbour*, *supra*, the facts would be parallel with those in the case at bar provided it be assumed—what is not true—that the Addison road was part of a receivership estate, and the defendant had been sued as receiver.

In that case the defendant was sued in the District of Columbia, as receiver of a railroad in Virginia, for a personal injury received on said road. He filed a plea to the jurisdiction of the court, setting up his receivership of the road, and averred that the plaintiff had not obtained leave of the court appointing him receiver to bring and maintain the suit. It was held on demurrer

JURISDICTION OF
CHANCERY TO IN-
TERFERE WITH
SUIT AGAINST RE-
CEIVER.

CASE OF BAR-
BOUR v. BARTON
EXAMINED AND
CRITICISED.

to this plea by the majority of the court that the court had no jurisdiction.

Mr. Justice Woods states the question for decision as follows: "The defendant insists that the supreme court of the District of Columbia had no jurisdiction to entertain the suit *without leave of the court by which he was appointed*. The qualifying words in italics are made the hinge upon which the question of jurisdiction is made to turn. The learned judge continues: "It is a general rule that before suit brought against a receiver, leave of the court by which he was appointed must be obtained. *Davis v. Gray*, 16 Wall. 203, and cases there cited. . . . A suit, therefore, brought without leave to recover judgment against a receiver for a money demand is virtually a suit the purpose of which is, and effect of which may be, to take property of the trust from his hands and apply it to the payment of the plaintiff's claim without regard to the rights of other creditors, or the orders of the court which is administering the trust property. We think, therefore, it is immaterial whether the suit is brought against him to recover specific property, or to obtain judgment for a money demand. In either case, leave should be first obtained."

Again, as showing the reason for the rule, the court says: "If the court below had entertained jurisdiction of this suit, . . . it would have been an usurpation of the powers and duties which belonged exclusively to another court, and it would have made impossible of performance the duty of that court to distribute the trust assets to creditors equitably and according to their respective priorities."

The court thus explicitly lays down the rule that leave to prosecute must first be had, for the reason that otherwise the trust assets cannot be equitably distributed, and priorities will be disregarded.

What are the assets of the trust that are to be distributed among creditors according to their proper priorities? Fortunately the learned judge has answered this question in his opinion. He says: "It was said by the court in *Cowdrey v. Galveston, etc., R. Co.* 93 U. S. 352, that the allowance for goods lost in transportation, and for damages done to property whilst the road was in the hands of the receiver, was properly made. The earnings received were as much chargeable with such loss and damage as they were chargeable with the ordinary expenses of managing the road. The bondholders were only entitled to what remained after charges of this kind, as well as the expenses incurred in their behalf, were paid." The learned judge then adds his own approval of this doctrine: "The claim of the plaintiff, which is against the receiver for a personal injury sustained by her while travelling on the railroad managed by him, stands on precisely the same footing as any of the expenses incurred in the execution of the trust, and must be adjusted and satisfied in the same way."

All will agree that the learned judge's definition of receivership expenses is correct. No fund can be available for distribution among the creditors of the trust except net income. All expenses of management and all expenses incidental to management must be paid before the rights of creditors attach to income.

It is conceded in *Barton v. Barbour* that, in the book-keeping of the receivership, compensation must be made to the plaintiff as part of the expenses of management before any adjustment of priorities is had or any debts of trust creditors paid. Her compensation for her injury is the same in amount, in the eye of the law, whether it be allowed in one court or another. What difference, then, does it make with the funds of the receivership whether the suit be in the courts of the District of Columbia or in the courts of Virginia? What difference would it make with the assets whether the plaintiff sued in the District of Columbia with leave of the Virginia court or without leave?

With all due respect to that court, it is submitted that some reason, other than its effect upon the rights of trust creditors, must be found for the rule that leave to prosecute is a condition precedent to the existence or exercise of jurisdiction in the common-law courts.

In weighing the force of the decision in *Barton v. Barbour*, it is to be remembered that the question arose upon a plea to the jurisdiction; and jurisdiction is denied for want of leave from the court of equity in Virginia to prosecute the suit. The learned judge does not favor us with the citation of any authorities holding that the jurisdiction of a common-law court has ever been held to be dependent upon the consent of a court of equity.

It is not surprising that Justice Miller felt constrained to give expression to his dissent from the position taken by the majority of the court. Speaking of the contest between the courts of equity and the common-law courts in England, he says: "In the contests between these courts it was never claimed that the court of chancery could act directly upon the court of law, or that the latter was bound in any way to follow the decisions of the former. Nor could the chancellor direct his writ to the common-law court or its officers; but if it was determined to give any equitable relief in the matter pending in the law court, the injunction or other chancery process was directed to the suitor. Upon him alone was the power of the court exercised. In such a case as this, if the court of chancery was of opinion that the plaintiff was improperly interfering with the functions of the receiver, it could restrain him by injunction or punish him by attachment for contempt. . . . But I know of no principle or precedent whereby a court of law, having before it a plaintiff with a cause of action of which it has jurisdiction, and a defendant charged with an act also within the jurisdiction, is bound or is even at liberty to deny

the plaintiff his lawful right to a trial because the defendant is a receiver appointed by some other court, and to leave the suitor to that court for remedy, when it is known that some of the most important guaranties of the trial to which he is entitled, and which are appropriate to the nature of his case, will be denied him." Justice Miller quotes with approval many of the cases cited *supra*, including *Sprague v. Smith*.

It is quite true that it has often been said by courts and text-writers that leave to prosecute must be had before instituting suit against a receiver in the common-law courts. But, like many other *dicta* with which the books abound, this proposition has doubtless been accepted upon trust and promulgated without giving its import careful consideration.

If a plaintiff in a suit at law is enjoined and the injunction afterwards removed, he does, in a practical sense, have leave to prosecute his suit, and it is not improbable such procedure gave rise to the notion that leave to prosecute is an essential pre-requisite.

The case of *Palys v. Jewett*, 32 N. J. Eq. 302, is cited, and although the court repeats the proposition above referred to, still the whole drift of the reasoning shows that it rests on no solid foundation in reason. In that case the court of chancery had entertained a suit for damages occasioned by the negligence of the servants of the defendant, a receiver of a railroad. On appeal, Chief Justice Beasley sharply reprobates the notion that a court of chancery can try such a question, and maintains that a court of law with a jury is the only tribunal that can properly determine it. In the course of his opinion he says that power exercised by the court of chancery was to prevent the taking of the receivership property from the receiver, and to prevent baseless litigation against him, and that this is accomplished by requiring leave to prosecute the action at law from the chancery court. He adds that such leave will be granted, not *ex gratia*, but *ex debito justitiæ*. In the light of this case, leave to prosecute the action at law accomplishes the same purpose as the dissolution of an injunction restraining the prosecution.

If a court of chancery cannot properly try an action for negligence, and leave to institute it will be granted as matter of legal right, it would seem that a rule requiring a plaintiff to go through the meaningless ceremony of applying for a privilege that he already by right possesses to a court powerless in itself to give him relief in the premises, has no substantial ground to rest upon.

This case, in its reasoning, upholds the conclusions which we reach in the case at bar.

Upon the whole, we think it is demonstrably clear that the defence set up in the case at bar does not go to the jurisdiction of the common-law courts, and we reaffirm the doctrine announced in *Blumenthal's Case*, 38 Vt. 402, and in *Newell's Case*, 49 Vt. 255,

and by the other cases and authorities cited, that the defence is one that the receiver can only make by invoking the interference of the court of chancery with the party prosecuting him in the common-law court.

The defendant further insists that the declaration is bad in substance, but we think it sufficient. It is not necessary to allege in the declaration affirmatively that the plaintiff was without negligence, or that he was ignorant of the insufficiency of the roadbed and track, or the particulars in which the road was insufficient. It does sufficiently allege the duty of the defendant, its breach, and that the intestate was injured by reason of this breach of duty while he was in the line of his duty as an employee.

The liability of the master for injuries to his servant is well expressed in *Davis v. Central Vt. R. Co.*, 55 Vt. 84; s. c., 11 Am. & Eng. R. R. Cas. 173, and this declaration covers all the essential elements involved in a right of recovery as there defined.

The *pro forma* judgment of the county court, sustaining the demurrer and adjudging the special plea insufficient, is affirmed, and the case remanded, with an order that the defendant answer over.

Leave to Sue Receivers.—The rule sanctioned by the weight of authority in this country is that where a railway company is in the hands of a receiver by appointment of a court of equity, the receiver cannot be sued at law without the permission of the court making such appointment. *Melendy v. Barbour*, 78 Va. Rep. 544; s. c., 25 Am. & Eng. R. R. Cas. 62; *Wiswall v. Sampson*, 14 How. 65; *Davis v. Gray*, 16 Wall. 263; *Barton v. Barbour*, 14 Otto, 126; s. c., 4 Am. & Eng. R. R. Cas. 1; *Rogers v. Mobile, etc., R. Co.*, 12 Am. & Eng. R. R. Cas. 443; *Dow v. Memphis, etc., R. Co.*, 17 Am. & Eng. R. R. Cas. 324. For a full discussion of Liability of Receivers see note to *Gibbes v. Greenville, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 736.

The supreme courts of *Wisconsin* and *Iowa* have departed from this doctrine, and hold that in all cases where there is no attempt to interfere with the actual possession of the receiver, a suit may be prosecuted against him in any court of competent jurisdiction without the permission of the court from which the receiver derived his appointment. *Kinney v. Crutcher*, 18 Wis. 74; *Allen v. Central R. of Iowa*, 42 Iowa, 688. See also, for analogous cases, *Hills v. Parker*, 111 Mass. 508; *Paige v. Smith*, 99 Mass. 395. For a strong opinion in support of the doctrine, see *City R. Co. v. Smith*, 19 Kan. 225. For a strong opinion against it, see *Thompson v. Scott*, 8 Cent. L. J. 787; s. c., 4 Dill. 508. The weight of authority is decidedly against this position. *Melendy v. Barbour*, *supra*. See also *Thompson v. Scott*, 4 Dill. 508; *Davis v. Gray*, 16 Wall. 203, 218; *Barton v. Barbour*, 104 U. S. 126; *Kennedy v. Indianapolis C. & L. R. Co.*, 3 Fed. Rep. 97; s. c., 2 Flippin, 704; *Parker v. Browning*, 8 Paige, 388; *De Groot v. Jay*, 30 Barb. 483; s. c., 9 Abb. Pr. 364; *Taylor v. Baldwin*, 14 Abb. Pr. 166; *Miller v. Loeb*, 64 Barb. 454; *Little v. Dusenbury*, 46 N. J. Law, 614; s. c., Am. Rep. 445; *Angell v. Smith*, 9 Ves. 335; *Brooks v. Greathead*, 1 Jac & Walk. 176; *Ranfield v. Ranfield*, 3 De G., F. & J. 766, reversing s. c., 1 Dr. & Sm. 310; *Searle v. Choate*, 25 Ch. D. 723; *Tink v. Rundle*, 10 Beav. 318; *Evelyn v. Lewis*, 3 Hare, 472; *In re Persse*, 8 Ir. Eq. 111; *Andrews v. Stanton*, 18 Bradw. 163, 165; *Graffenried v. Brunswick & A. R. Co.*, 57 Ga. 22;

Henderson v. Walker, 55 Ga. 481; *Wray v. Hazlett*, 6 Phil. 155; *Meredith, etc., Sav. Bank v. Simpson*, 29 Kan. 414; *Payne v. Baxter*, 2 Tenn. Ch. 517; *Heath v. Missouri, K. & T. R. Co.*, 88 Mo. 617, 623.

Act of March 3, 1887, Removal of Causes, § 3, U. S. Stat. 1886-1887, 552, provides: "That every receiver or manager of any property appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." How far this act changes the law concerning leave to sue receivers appointed by the United States courts, has not as yet been determined.

If a receiver duly appointed and in possession of the property in controversy, be sued without leave of the court appointing him first obtained, the parties who bring the suit may be subjected to proceedings in contempt. *Wiswell v. Sampson*, 14 How. 65, 66, 67; *Naumburg v. Hyatt*, 24 Fed. Rep. 898; *Kennedy v. Indianapolis C. & L. R. Co.*, 3 Fed. Rep. 97; *Thompson v. Scott*, 4 Dill. 508; *Express Co. v. Railroad Co.*, 99 U. S. 191, 198; *De Groot v. Jay*, 30 Barb. 488; s. c., 9 Abb. Pr. 364; *Taylor v. Baldwin*, 14 Abb. Pr. 166; *Davis v. Gray*, 16 Wall. 208, 218, and cases cited.

The proceedings in a suit so brought will generally be restrained by injunction or stayed or set aside on motion. *Evelyn v. Lewis*, 8 Hare, 472; *Tink v. Rundle*, 10 Beav. 318; *In re Persse*, 8 Ir. Eq. 54; *Kennedy v. Ind., etc., R. Co.*, 3 Fed. Rep. 97.

In *New York*, unless the proceedings are stayed by the court which appointed the receiver, the action will be considered regular and the judgment valid. *De Groot v. Jay*, 30 Barb. 488; s. c., 9 Abb. P. 364; *Taylor v. Baldwin*, 14 Abb. Pr. 166.

If the receiver choose to waive the protection of the court by which he was appointed, the want of leave cannot be made the ground of dismissing the suit after appearance. *Hubbell v. Dana*, 9 How. Pr. 424; *Naumburg v. Hyatt*, 24 Fed. Rep. 898, 901. See *In re Young*, 7 Fed. Rep. 855. See this position severely criticised in 25 Am. L. Reg. (N. S.) 289, 300, by H. Campbell Black, Esq.

The granting of leave to sue is discretionary. *Central Trust Co. v. Wabash, etc., R. Co.*, 23 Fed. Rep. 858; *Kennedy v. Ind., etc., R. Co.*, 3 Fed. Rep. 97; s. c., 2 Flippin, 704; *Melendy v. Barbour*, 78 Va. 544; *Davis v. Michebacher*, 31 N. W. Rep. 160.

The ordinary way of asserting a claim against property in the hands of a receiver is to intervene by petition. *Andrews v. Stanton*, 18 Bradw. 163, 165; *Olds v. Tucker*, 35 Ohio St. 581; *O'Meara, Admr., v. Holbrook*, 20 Ohio St. 137; *Porter v. Kingman*, 126 Mass. 141. See also *Palys v. Jewett*, 32 N. L. Eq. 302; *Lehigh Coal & Nav. Co. v. Cent. R. Co.*, 38 N. J. Eq. 175.

Leave when obtained should be alleged in the complaint or declaration, and the failure to do so has been held fatal on demurrer. *Keen v. Breckenridge*, 96 Ind. 60. See *Barton v. Barbour*, 104 U. S. 126.

From the mere fact that leave has been granted, no presumption can be drawn as to the validity of the plaintiff's claim. "The order simply permits a judicial investigation to be made; the examination is not itself a trial, nor is the decision an adjudication upon the merits." *Fleishauer v. Hittenhofer*, 49 N. Y. Super. Ct. 311; *Davis v. Duncan*, 19 Fed. Rep. 477; *Jay's Case*, 6 Abb. Pr. 293. See further as to granting of leave to sue a receiver in another court, *Matter of Platt*, 52 How. Pr. 468; *Meredith Village Sav. Bank v. Simpson*, 29 Kan. 414; *Central Trust Co. v. Wabash, St. Louis, etc., R. Co.*, 23 Fed. Rep. 858; *Palmer v. Scriven*, 21 Fed. Rep. 354; *Harding v. Nettleton*, 86 Mo. 658; *Henderson v. Walker*, 55 Ga. 481; *Curran v. Crair*.

22 Fed. Rep. 101; Wilkinson v. North Riv. Const. Co., 66 How. Pr. 423, 427, 428; Potter v. Bunnell, 20 Ohio St. 150, 159; Miller v. Loeb, 64 Barb. 454.

For a full discussion of suits by and against receivers, see Beach on Receivers, chap. xviii.

As to Right to Sue Receiver for Torts Committed on Leased Road, without Leave, see Kain v. Smith, 80 N. Y. 458; s. c., 2 Am. & Eng. R. R. Cas. 545.

FRANK

v.

EVANSVILLE AND INDIANAPOLIS R. CO.

(*Advance Case, Indiana. May 24, 1887.*)

The railroad company which received a conveyance from the board of trustees of the Wabash & Erie Canal of a portion of the lands occupied and used under the series of laws which provided for the construction of that canal, in terms purporting to convey such lands in fee simple, acquired thereby such an estate therein.

APPEAL by plaintiffs from a judgment of the Pike circuit court in favor of defendant in an action to enjoin the use of lands for railroad purposes heretofore appropriated to the Wabash & Erie Canal and recover such lands. Affirmed.

The facts are stated in the opinion.

E. A. Ely and *J. W. Wilson*, for appellants.

Asa Iglehart, John E. Iglehart, and Edwin Taylor for appellee.

Howk, J.—In this case, the only error complained of here by appellants, the plaintiffs below, is the ruling of the circuit court sustaining appellee's demurrer to the plaintiffs' complaint. This error calls in question the sufficiency of the facts, stated in such complaint to constitute a cause of action in plaintiffs' favor, and against the defendant below. The complaint was substantially as follows:

Said plaintiffs complain of the defendant, and say that heretofore, to wit, in the year 1847, one James Foster was the owner in fee of the land hereinafter described; that, after the location and construction of the canal hereinafter described, plaintiffs acquired, through conveyance from said James Foster, all of his interest in said land, including the servient estate hereinafter set out.

Said land is described as follows:

That heretofore, to wit, in the year 1847, while the said James Foster was the owner of the said land, the trustees of the Wabash & Erie Canal, under the acts of the General Assembly of the State of Indiana, by their officers, entered upon and constructed across and upon said land a canal known and designated as the Wabash & Erie Canal, and in so doing erected and constructed channels and embankments, waterways, towpaths, and beds for the water therein, and for many years thereafter, to wit, until the committing of the grievances named, thereby, and by reason of said canal so constructed and completed, the plaintiffs—who were in possession of the land adjoining said canal, being the remainder of said land so owned by the said Foster after the said canal was constructed—were possessed of many valuable privileges in the way of water for stock, conveniences, and valuable drainage, and many other convenient and valuable ways of easier approach from any portion of said land to the other portions thereof. The plaintiffs aver that, when said canal was so constructed, said James Foster was compensated for the land so taken by said canal-bed, and, in estimating his damages therefor, the rights, privileges, and benefits aforesaid were taken into consideration and charged to him as part of the compensation which he, as the owner of said adjoining land, would derive from the construction of said canal.

That the defendant is a railroad corporation organized under and by virtue of the general laws of the State of Indiana, and, as such corporation has constructed its railroad from the city of Evansville, Indiana, to the city of Terre Haute, over and upon the towpath and embankment so constructed by said Wabash & Erie Canal; that the defendant, said railroad company, has purchased all the right, title, interest, and franchises of said board of trustees of the Wabash & Erie Canal, and to the lands aforesaid on which said canal-bed, channel, towpath, and embankment were constructed; and that the same were duly conveyed to the defendant by proper deeds of conveyance, in terms purporting to convey said land in fee simple; but, without the consent, and without first having caused to be assessed to plaintiffs damages therefor, or tendered to them payment of any damage whatever, it has taken possession of and constructed its railroad upon said land as aforesaid, and is now operating the same thereon.

That in the construction of said railroad, the defendant dug down a portion of said embankment, and destroyed the waterways, channel, and canal-bed, and placed on the towpath of said canal its cross-ties and iron rails and its railroad, and thereby separates the plaintiffs' land, leaving a portion of the plaintiffs' land on either side of the same, obstructing its passageways over said canal; that before the construction of said railroad upon said towpath, through said land, said canal had been abandoned, and the plaintiffs had re-

possessed themselves thereof; and the plaintiffs aver that, upon the abandonment of said canal as a canal, and upon the repossession of the same by the plaintiffs, the title to said towpath and canal-bed, and the fee thereof, which was in abeyance thereby, reverted to the plaintiffs; and, inasmuch as the trustees of said canal had no power to convey said property other than for canal purposes, the defendant took no title from said canal trustees, except for canal purposes; and, by reason of the premises, the title to said land so occupied by said railroad company was and is vested in the plaintiffs. That the defendant, through its officers, is operating and threatening to operate said railroad over said land, without payment of compensation to the plaintiffs, and to their injury in the sum of \$100, and, if the defendant is not enjoined, it will continue so to make and operate its railroad.

That defendant is in possession of said real estate, and has been for the three years last past without the plaintiffs' consent, and claiming title thereto adversely to the plaintiffs, to their damage \$100. Wherefore, unless the defendant is enjoined by this court, it will waste and destroy the plaintiffs' rights aforesaid, and enjoyment of said land, and valuable franchises aforesaid, and render it unsafe for said plaintiffs to enjoy their rights and privileges aforesaid as the owners of the servient estate in said land over which said canal passes, in the same manner and to the same extent that they might, could, and would do but for the construction of said railroad; whereby said lands of the plaintiffs will be depreciated in value to the amount of \$100.

Wherefore the plaintiffs pray that the defendant may be enjoined from operating or maintaining said railroad over said lands, without having compensation first assessed and tendered to the plaintiffs, and judgment for the possession of said real estate, and for \$100 damages, and all proper relief.

We are of opinion that the court below did not err in sustaining appellee's demurrer to the foregoing complaint. It is shown by the averments of such complaint that the land in controversy herein is the land in Pike county, whereon the canal known as the Wabash & Erie Canal, and its channels, embankments, waterways, towpaths, and beds for the water therein, were constructed under and by the State of Indiana and its successors, pursuant to certain acts of the General Assembly.

By § 8 of the act of January 19, 1846, to provide for the funded debt of this State and for the completion of the Wabash & Erie Canal to Evansville, it was made the duty of the governor, in the name and under the seal of the State of Indiana, to execute and deliver to the board of trustees of the Wabash & Erie Canal a deed or patent for the bed of such canal and its extensions from the Ohio State line to Evansville, including its banks, margins, towpaths, etc. In their complaint herein the plaintiffs alleged, as

we have seen, that the defendant railroad company had purchased all the right, title, interest, and franchises of the board of trustees of the Wabash & Erie Canal in and to the land in controversy herein, whereon such canal-bed, channel, towpath, and embankment were constructed; and that the same were duly conveyed to such defendant by a proper deed of conveyance in terms purporting to convey such lands in fee simple.

The question is presented by appellants' complaint, and this is the only question for our decision in this case. What estate, title or interest had the board of trustees of the Wabash & Erie Canal in the land in controversy herein, prior to and at the time of the conveyance thereof by such board to the defendant railroad company, under and by force of the taking thereof, and the construction thereon of such canal-bed, channel, towpath, and embankment, and the conveyance of the same by and in the name of the State of Indiana to such board of trustees? The same question substantially has been considered and decided by us in so many previous cases to be found in our reports that it cannot now be regarded as an open question in this court. *Waterworks Co. v. Burkhart*, 41 Ind. 364; *Nelson v. Fleming*, 56 Ind. 310; *Cromie v. Board of Trustees*, 71 Ind. 208. It was held in the cases cited, where lands had been taken, occupied, and used under the series of laws which provided for the construction of the Wabash & Erie Canal, that the estate taken in such lands was an estate in fee simple, and not a mere easement therein.

BOARD OF TRUSTEES
ACQUIRED
AND CONVEYED
AN ESTATE IN
FEE SIMPLE.

In *Logansport v. Shirk*, 88 Ind. 563, in speaking of the cases last cited, it was said: "We acquiesce in, rather than approve of, the doctrine of these cases upon the question first stated. This we do, not because the decision of the question in either of the cases meets the full approval of our judgments, but for the reason stated in the case last cited (*Cromie v. Board of Trustees, supra*), that since the decision of the *Burkhart Case*, 41 Ind. 364, large rights may have been acquired on the faith of that decision that would be utterly destroyed by overruling it. The case is one of the class which the doctrine of *stare decisis* applies with all its force." *Rockhill v. Nelson*, 24 Ind. 422; *Goodtitle v. Kibbe*, 9 How. 471, 478; *Schori v. Stephens*, 62 Ind. 441.

Nearly fifteen years have now elapsed since this court decided, in *Waterworks Co. v. Burkhart, supra*, where lands had been taken and used under the laws which provided for the construction of the Wabash & Erie Canal, that the estate so taken in such lands was an estate in fee simple, and not a mere easement therein. Upon the faith of that decision we may well suppose that during those years large investments have been made in the lands so taken and used for the construction the Wabash & Erie Canal and to that extent the decision in that case must be regarded as a "rule

of property." For this reason we cannot now hold that, where lands were so taken and used for the construction thereon of such canal, and its channels, embankments, waterways, towpaths, and beds for the water thereof, any less estate was taken or acquired in such lands than an estate in fee simple. *Schori v. Stephens, supra.*

The judgment is affirmed, with costs.

G., B. AND L. R. Co. *et al.*

v.

EAGLES.

(*Advance Case, Colorado. March 4, 1887.*)

The defendant railroad company, while excavating for a roadbed on its right of way, cast rock and *débris* upon the adjoining land during its blasting operations. For this trespass the land-owner brought suit. *Held:*

1. That the company was liable to respond in damages.
2. That the plaintiff was entitled to recover for damages to the rents and profits lost in consequence of the removal of his tenants, and his inability to rent the property on account of the blasting operations, in addition to damages for the actual physical injury to the property.
3. That it was proper on the trial to ask the plaintiff if he could not have rented the tenements but for the railway, as such a question called for the witness's belief on a matter within his own knowledge, and not calling for an opinion on a question of science or skill.

APPEAL from county court, Clear Creek county.

The appellant company, having procured the right of way for its railroad through Georgetown, proceeded to excavate for its roadbed. In so doing, the removal of rock by blasting became necessary. While its employees were thus engaged, large pieces of rock and other *débris* were hurled into the air, falling at considerable distances, and upon the premises of private parties, including plaintiff, living in the vicinity. Pieces of rock thus thrown fell upon the roofs of two of plaintiff's buildings, badly breaking them, and doing considerable damage. Besides this, plaintiff avers, and supports the averment with proof, that, by reason of the danger from falling missiles, tenants vacated his premises, other persons refused to lease, the buildings remained vacant, and he was seriously injured by the loss of his usual rentals. To recover for these alleged damages, plaintiff brought this action. The jury returned a verdict for the sum of \$275, upon which verdict judgment was duly rendered.

HELM, J.—It is conceded that the defendant company was in possession of the right of way lawfully, and that it was engaged in the prosecution of a lawful enterprise. It is further conceded that there was no actual intention to injure plaintiff. No direct evidence was offered to show negligence or carelessness in the blasting. And unless the fact of the missiles falling upon plaintiff's premises, and the consequent danger and damage, be regarded as proof of negligence, or create a presumption of negligence, we must assume that defendants proceeded with ordinary care and caution.

The principal question submitted for adjudication is as follows: Was plaintiff, under the circumstances, entitled, as a matter of law, to recover? Defendants did not plead or prove any authority, either by contract, or by compliance with law, to cast the fragments of earth and rock upon plaintiff's premises. Legal possession by the company of a right of way over adjacent land, and authority to construct and operate its railroad thereon, did not, of themselves, authorize or sanction a direct intrusion and trespass upon plaintiff's private property. *St. Peter v. Denison*, 58 N. Y. 416; *Hay v. Cohoes Co.*, 2 N. Y. 159; *Scott v. Bay*, 3 Md. 431.

TRESPASS ON
PRIVATE PROP-
ERTY NOT AU-
THORIZED.

Counsel for defendants rely in argument upon the proposition, thus stated in their brief: "If damage result from doing a lawful act in a lawful manner, no recovery can be had." It is true that an act may produce both injury and damage, yet no right of action exists in favor of the party aggrieved. But the proposition of counsel must be accepted with the proviso that the act, or the manner of its performance, does not result in the invasion of the legal rights of another. This proviso is fairly implied by counsel's language; for, if such rights are directly abridged, the act and the manner of its performance cannot both be "lawful." In general, if a voluntary act, lawful in itself, may naturally result in the injury of another, or the violation of his legal rights, the actor must at his peril see to it that such injury or such violation do not follow, or he must expect to respond in damages therefor; and this is true, regardless of the motive or the degree of care with which the act is performed. See the following cases, and others cited therein: *Hay v. Cohoes Co.*, 2 N. Y., *supra*; *Tremain v. Cohoes Co.*, 2 N. Y. 163; *Cahill v. Eastman*, 16 Minn. 324, (Gil. 292); *Phinizy v. Augusta*, 47 Ga. 260; *Rylands v. Fletcher*, L. R. 3 H. L. 330; *St. Peter v. Denison*, 58 N. Y., *supra*; *Wilson v. New Bedford*, 108 Mass. 261; *Scott v. Bay*, 3 Md., *supra*; *Cooper v. Randall*, 53 Ill. 24.

DOING LAWFUL
ACT IN LAWFUL
MANNER.

Plaintiff in the case at bar was entitled to the undisturbed possession, use, and enjoyment of his premises, and to the rents and profits therefrom. These were *legal rights* with which defendants

could not in law so justify direct interference as to escape accountability. Perhaps on the ground of public policy an injunction to restrain the excavating of defendant company's roadbed would not have issued at the suit of plaintiff, even though blasting were necessary; but public policy could not exonerate the company from liability for private damage directly resulting from its acts. The company was bound at its peril to see that plaintiff's rights of property were not injuriously affected. In so far as these rights were interfered with by defendants' acts, such acts were wrongful; and, if the injuries complained of were the natural and proximate consequence thereof, plaintiff was entitled to recover.

"It is generally held that, in order to warrant a finding that . . . an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the . . . wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Milwaukee, etc., R. v. Kellogg*, 94 U. S. 369; *Cooley Torts*, p. 69, and note 1, p. 70.

Speaking of *Hay v. Cohoes Co.*, *supra*, the supreme court of Missouri uses the following language: "The scattering of the fragments of rock in all directions, beyond the control of the party, was a natural consequence of the blasting, and must have been foreseen as probable." *Miller v. Martin*, 16 Mo. 508.

In considering this question, juries are usually called upon to inquire whether, among all the specific circumstances, there appears an intermediate cause between the act or wrong complained of and the injury produced. And, if "there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it." *Milwaukee, etc., R. v. Kellogg*, *supra*.

Looking to the circumstances in the case before us for an intervening cause, the jury could not reasonably have found one. The casting of the rock and *débris* upon plaintiff's premises was a wrongful act. The damage to the buildings struck, and the frightening away of his tenants, were the direct and proximate effects. Upon some of the minor questions involved, the evidence might have been more satisfactory; but we cannot pronounce it wholly inadequate to sustain a finding that actual danger existed from the falling missiles, whereby certain tenants were reasonably induced to vacate the premises, and other persons deterred from leasing. We do not feel warranted in disturbing the verdict for insufficiency of the evidence.

If the court erred in charging the jury, it was in defendants' favor. The instruction, given upon defendants' request, that "plaintiff is not entitled to recover anything in the way of damages arising necessarily from the proper execution of the work," might possibly have misled the jury; but their verdict clearly

shows that it did not; and, besides, had it done so, it is obvious that defendants could not complain. If it be true that this instruction conflicts with another, such conflict could in no way have prejudiced defendants, or either of them. Our view of the law already announced obviates the necessity of discussing further objections to the charge.

It is assigned for error that while upon the witness-stand plaintiff was asked, "Could you not have rented these tenements but for the railway?" and answered, "I think I could." No question of science, skill, or trade was being inquired into. The belief of plaintiff was based upon facts within his own actual knowledge. These facts were detailed by him to the jury, in connection with the testimony objected to. The cause of plaintiff's failure to rent his premises was the gist of the investigation; it was one of the ultimate facts to be established. Under the circumstances the court did not err in receiving the opinion of plaintiff, if opinion it can be called. *Hanna v. Barker*, 6 Colo. 303; 1 Greenl. Ev. § 440 and notes; opinion of Doe, J., in *State v. Pike*, 49 N. H. 408.

QUESTION AS TO
RENTAL OF PROP-
ERTY WAS PRO-
PER.

The judgment of the court below is affirmed.

G., B. AND L. R. Co. *et al.*

v.

DOYLE.

(*Advance Case, Colorado. March 4, 1887.*)

Damages for loss of business can be recovered by a hotel-keeper in an action against a railroad company, who, in blasting rocks for the purpose of building the roadbed, cause guests to leave the hotel in fear of flying rocks and other *débris*.

In such an action, evidence of injury to other buildings in the immediate vicinity of plaintiff's building is admissible on the question whether the danger from the missiles was so great as to justify the fears of plaintiff's guests, and authorize their departure; for, if it was not, plaintiff would not have a right to recover.

APPEAL from county court, Clear Creek county.

This case, like that of *G., B. & L. R. Co. v. Eagles*, *ante*, 228, is an action for damages occasioned by blasting in the excavation of the defendant company's roadbed. Sarah Doyle, who was plaintiff below, owned a certain building in Georgetown near the place where defendant was doing its work. This building she was using as a hotel, and, when defendant's excavating commenced, she had considerable patronage. The averments of the complaint,

which the proofs tend to support, show that pieces of rock and *débris* were hurled into the air by defendant's blasts, and fell upon plaintiff's premises; that danger to person and property was thus occasioned; that the explosions and the rocks falling upon and around plaintiff's hotel excited terror in the minds of her guests, which led them to abandon her house; and that for a considerable period of time her business was thus completely destroyed. Verdict and judgment in plaintiff's favor for \$168.

HELM, J.—The main question submitted in this case is precisely similar to that considered in *G., B. & L. R. Co. v. Eagles*, *ante*, 228 (just determined). The same considerations are here pertinent, and are equally decisive. Our conclusions, therefore, upon this question, need not be restated. The amendment made by the court to defendant's instructions was not error. The instruction as finally given was consistent with the law as understood by us, and announced in the opinion mentioned.

But a single additional assignment of error need be noticed. Testimony was received showing injury to buildings belonging to other persons, but situated in the vicinity of plaintiff's hotel. It is insisted that this testimony was not admissible, and that its reception constituted a fatal error. Such evidence was not competent to show the amount of plaintiff's damages, nor was it offered or received for this purpose. But an important question upon which the jury, in our judgment, were called to pass, related to the danger occasioned by the falling rock and *débris*. If the fears of plaintiff's guests were unreasonable and groundless, their fright and departure should not lay the foundation of a claim for damages against defendant. The recovery should be confined at least to nominal damages. As bearing upon this question, we think the testimony was admissible. The fact that other buildings in the neighborhood had been struck, that rocks weighing from two to three hundred pounds crushed into and through other houses near by, tended to establish the character and reality of the danger actually existing, and to warrant the feeling of insecurity which deprived the hotel of patronage.

While the presence of danger from falling fragments of earth and rock is sufficiently shown, the evidence in this case, as in the *Eagles Case*, is in some other respects not strong or satisfactory; but we do not feel justified on this account in setting aside the verdict.

The judgment is affirmed.

Company Trespassing on Land Adjoining Right of Way.—*Carey v. Chicago, etc., R. Co.*, 20 Am. & Eng. R. R. Cas. 469.

Injury Caused by Negligent Blasting—Recovery of Damages.—In *Dodge v. County Commissioners*, 3 Metc. (Mass.) 380, it was held that the damages occasioned by laying out and making a railroad include injuries which are

done to buildings near the line of the road, by means of blasting, in a proper manner, a ledge of rocks through which the railroad passes. Chief Justice Shaw said: "But it is said that the damage done to the petitioner's house, not on the line of the railroad, was accidental and consequential, and not the necessary effect of making the railroad.

"The statement made in the petition and admitted in the answer, is, that the company located and constructed their railroad through land next adjoining that of petitioners; that they contracted with persons to blast a ledge of rocks in such adjoining lands, and agreed to indemnify them against any damages arising therefrom; and that, in blasting said rocks, the house of petitioners was necessarily destroyed.

"An authority to construct any public work carries with it an authority to use the appropriate means. An authority to make a railroad is an authority to reduce the line of the road to a level, and for that purpose to make cuts, as well through ledges of rock as through banks of earth. In a remote and detached place, where due precautions can be taken to prevent danger to persons, blasting by gunpowder is a reasonable and appropriate mode of executing such a work; and, if due precautions are taken to prevent unnecessary damage, is a justifiable mode. It follows that the necessary damage occasioned thereby to a dwelling-house or other building, which cannot be removed out of the way of such danger, is one of the natural and unavoidable consequences of executing the work, and within the provisions of the statute.

"Of course this reasoning will not apply to damages occasioned by carelessness or negligence in executing such work. Such carelessness or negligent act would be a tort, for which an action at law would lie against him who commits, or him who commands it. But where all due precautions are taken, and damage is still necessarily done to fixed property, it alike is within the letter and equity of the statute, and the county commissioners have authority to assess the damages."

The Vermont court considered the same question in the case of *Sabin v. Vt. Central R. Co.*, 25 Vt. 363. The court says: "In this case, if ledges or loose stones of considerable size are upon the land taken for the track of the road, at the time of the appraisal, it would naturally be in the mind of the appraisers that the stone must be removed in constructing the road; and being of a character only removable ordinarily by blasting, it must occur to them that fragments more or less must be thrown upon the adjoining lands, and that it would be necessary to go upon the land to remove such fragments. It would be the duty of the company, no doubt, to conduct this blasting in such a way as to do the least possible injury to the adjoining lands; and when by such operation stones were thrown without the limits of the land taken by the road, by unavoidable necessity, to remove them as soon as it could reasonably be done. And the fact that such fragments were imbedded in the soil could make no difference. It could not be allowable for them to suffer the stone to remain thus. There is no necessity for this, but there is for throwing them, to some extent, upon the adjoining land. It seems probable enough, from the facts detailed in the present case, that the damages sustained arose chiefly from not removing the stone in due season. But the recovery below went upon the ground that the defendants had no right to throw the stone upon the plaintiff's land. It therefore becomes necessary to consider that question. The Massachusetts courts seem to have considered that for damages of this character no action will lie, if there is no want of ordinary care on the part of the company, and no doubt, for any such want of common care, whether in conducting the operations of construction or in not relieving a party from necessary temporary loss or inconvenience, the action should be case and not trespass. And the party is not to be made a trespasser *ab initio* by mere non-feasance. *Stoughton v.*

Mott, 25 Vt. 668. Indeed, it has not been maintained that the plaintiff might maintain trespass for this injury except upon the ground that the defendants had no right to throw the stone upon the plaintiff's land. It seems to us very obvious that the right of the defendants to blast these rocks, in a reasonable and prudent manner, did exist, and was conferred by the decision of the commissioners appraising the plaintiff's damages. And if we test the effect of that adjudication by the ordinary test of the extent of judgments in merging claims, namely, that every claim is "barred which was presented, or which might have been presented, under the particular question before the commissioners, there will be little ground of question remaining. The plaintiff had the right to claim, and was, of course, bound to present his claim, for all damages he was likely to sustain, not only in the running of the road, by fires of engines and the like, but in the building of the road, in the ordinary mode, where blasting is universal,—and this not in respect of land taken only, but of the remaining land, as has been repeatedly decided. And if this claim was not presented when it might have been, it is barred upon general principles universally recognized, that no one shall be again called in question for what was or what might and should have been adjudicated. It seems to us that to deny the defendants the right to excavate by blasting is to deny them the right to construct their road; and if they have the right to blast, they are no more liable, or in any different form, from what all citizens are, for prudent conduct of their legal business, which may be attended with injurious consequences to others. If the throwing of fragments of rock is an unavoidable consequence, then so far as the owner of land taken is concerned, his probable and prospective damage as to his remaining land is to be appraised; and if he does not make such claim, or if more damage occurs than was anticipated at the time, he is equally barred as if his claim had been presented, or less damage had occurred than was appraised. As we have intimated, it is clear that for blasting at improper seasons, thereby causing unnecessary damage to crops, and for doing it in an imprudent or unskilful manner, or for not removing the stone in due time,—and that must be considered the shortest time in which it can be done, and with the least injury to the land,—the party is entitled to his remedy in the proper form. But if the defendants' charter confers the right to do the act, of which, as we have said, there can be no doubt, it seems to us impossible to allow the action of trespass for the original act, thereby treating it as unlawful. And it is too well settled to be now brought in question that no mere omission, or want of care or skill in doing a lawful act, will render such act a trespass by relation."

CARTWRIGHT

v.

NEW YORK AND MONTREAL R. Co.

(*Advance Case, Vermont. May 28, 1887.*)

Section 3372, Rev. Laws of Vermont, provides that railroads shall be liable to day-laborers employed by contractors for labor in constructing their roads. An action was brought under this statute to recover for work done on a contract made and to be performed in New York. *Held*, that the action cannot

be maintained; that if New York has a statute imposing a similar liability on railroads, the action should have been based upon that statute.

ACTION on the statute, Rev. Laws, § 3372. Heard on an agreed statement, December term, 1886, Bennington county, Ross, J., presiding. Judgment *pro forma*, and without hearing, for the defendant. Affirmed.

The case appears in the opinion.

C. H. Mason for plaintiff.

Batchelder & Bates for defendant.

ROWELL, J.—This action is founded on Rev. Laws, § 3372, which makes railroad companies liable to day-laborers employed by contractors, for labor performed in constructing their roads. FACTS.

The defendant is a New York corporation, owning and operating a railroad from Chatham, New York, to Bennington, this State, with its principal office in New York City, and the office of its general manager, superintendent, etc., in Bennington.

Plaintiff's labor was performed on that part of the road lying in New York, where we understand him to have lived, and to still live, and his contract for labor to have been made with the contractors, whose place of residence does not appear, nor where this contract with the company was made.

Plaintiff's contract, then, with the contractors being made in New York, and to be performed there, would be governed by the laws of that State; and whatever privity existed between him and the company by reason of that contract and his labor under it, and whatever liability was thereby imposed upon the company to pay for his labor, must have existed and been imposed by some statute of that State, as otherwise he could have no claim against the company; for at common law there was no privity between him and it.

PLAINTIFF'S
CONTRACT WAS
GOVERNED BY
THE LAWS OF
NEW YORK.

But whether there is any such statute in New York does not appear; and if it did, it would make no difference; for this action is not based upon a New York statute, as it probably might have been if there is one, and a perfected cause of action under it,—*McLeod v. Connecticut & P. Riv. R. Co.* 58 Vt. 727; s. c., 28 Am. & Eng. R. R. Cas. 644—but upon our statute, which cannot be successfully invoked, as it can have no extra-territorial effect in this behalf.

Judgment affirmed.

See next case and note.

DUDLEY

v.

TOLEDO, ANN ARBOR AND NORTH MICHIGAN R. Co.

(Advance Case, Michigan. April 28, 1887.)

It is provided by a Michigan statute (How. Stat. §§ 3423, 3425), entitled "An Act to provide for the protection of laborers, and persons furnishing materials for the construction and repairing of railroads in this State," that such laborers and persons shall have the right to stop payment of money due contractors in the hands of the company, and to compel the application of such money to their own claims. The plaintiff brought suit under this statute to recover of the railroad company the value of the merchandise, etc., which he had furnished to laborers upon the road, on the order of the contractor. *Held:*

1. That in order to entitle the plaintiff to recover he must prove that his claim is undisputed, and acknowledged to be due from the contractor; that the amount which he claims as against the company is due from the contractor; and that an itemized bill for labor or material furnished to the contractor has been duly presented to the company.

2. That an assignee of a claim for labor and materials furnished in the construction or repair of a railroad is entitled to all the benefits of the statute; but that an order given by a sub-contractor upon a merchant in favor of a laborer, by which the latter obtains goods, does not amount to an assignment of the laborer's claim so as to enable the merchant to proceed against the railroad company under the statute.

3. That bills for the keep of teams, for feed furnished, and for the board of men employed on the road, do not come within the protection of the act.

4. Where the only evidence offered on the trial to show the amount due from the defendant to its contractor was the statement of one of the directors of the railroad company, and superintendent or manager of the construction for the railroad company, that "he would try and have them paid, and thought possibly some of them would be paid at that pay-day in December," such testimony neither proved that the railroad owed its contractors, nor the amount, if any, of such indebtedness, and the case should have been taken from the jury on this point.

ERROR to the Livingston circuit court to review a judgment against defendant in an action to hold the railroad company liable for goods furnished to it and for the board of laborers on such road, and for keeping of teams and hay, feed, and other supplies. Reversed.

The facts are stated in the opinion.

Luke S. Montague for defendant, appellant.

Jay Corson for plaintiffs, appellees.

CHAMPLIN, J.—This action was commenced under How. Stat. §§ 3423, 3425, being an act passed by the legislature in 1871, entitled,

"An Act to provide for the protection of laborers, and persons furnishing material for the construction and repair-
ing of railroads in this State." The act first makes it PROVISIONS OF STATUTE. lawful for the railroad company, when entering into a contract for work, labor, or materials, to provide in the contract for the payment of laborers and persons furnishing materials to such contractors or sub-contractors; and if no such provision is made in the contract, it is made lawful for the railroad company to withhold payment until such laborers and persons furnishing material are paid. The act then declares that it shall be the duty of such railroad company, by agent or otherwise, at each pay-day on said roads, to see that all laborers and persons furnishing material, employed by contractor, contractors, or sub-contractors, are paid before payment is made to said contractors, not to exceed the amount due from the railroad company to such contractors. The provisions of the act do not apply to any iron or other materials or property used in ironing and equipping the road. It is also subject to this proviso: "That a bill of items of the labor and material furnished to said contractor or sub-contractors shall be furnished to the company, through their agent or otherwise, together with the amount claimed, prior to the usual pay-day of said company, when such claim shall be due; or in case the contractor or contractors are not then paid, then prior to the payment then due."

Section 3425 reads as follows: "On compliance with the provisions of § 1 of this act, the persons performing the labor or furnishing the materials mentioned in § 1 shall have the right to collect pay for the same from said railroad companies by action, as in case of other claims against said railroad companies, if the said claim or claims are undisputed and acknowledged to be due from said contractor or sub-contractors."

Section 3425 enacts that "if the amount claimed to be due from the contractor or sub-contractors is disputed by them, then said company shall withhold the payment from both till the same has been adjudicated, as in other actions, before some court having jurisdiction of the amount in controversy, and judgment duly rendered, when the company shall pay over the amount of the judgment to the party recovering the same against said contractor or sub-contractors, provided the amount of said judgment is due to said contractor or sub-contractors from said company; if not, then so much as is due on said contract."

The true intent and object of the act, as expressed in its title, is to protect laborers and persons furnishing material for the construction and repairs of railroads. The extent to which such protection is extended depends upon and is limited to the amount due from the railroad company to its contractor at the time the bill of items WHAT MUST BE SHOWN IN SUIT UNDER THE STATUTE.

of the labor and material furnished is furnished to the company. It is also limited to such labor and material as is performed and used in constructing or repairing the railroad. The labor applies to manual labor of persons employed, and does not extend to teams used upon the work. This is evident from the title, which expresses the object to be to protect laborers. The material referred to is such material as enters into the construction or repairing of the railroad, and does not apply to material used or supplied for any other purpose. Feed furnished for teams employed in working upon the road, clothing or board of men so employed, would not come within the language or meaning of the act, because such feed, board, and clothing are not used in constructing or repairing the railroad. To entitle a plaintiff to recover under this act, he must allege and prove that the items for labor which he claims payment for were performed by a laborer employed by a contractor with the company, or by a sub-contractor, in the constructing or repairing of the railroad; and the materials for which he claims payment were furnished to a contractor or sub-contractor to be used in constructing or repairing the railroad. He must further show that a bill of the items of the labor and material furnished to the contractor or sub-contractor has been furnished to the railroad company together with the amount claimed, prior to the usual pay-day of the company, when such claim shall be due; or, if the contractor was not paid on the usual pay-day, then prior to the payment then due to the contractor.

He must further show, in order to establish a cause of action, that at the time he furnished the company with a bill of items, or at the pay-day next ensuing, there was an amount due from the company to the contractor, and the amount of such indebtedness. It is contended by the plaintiffs' attorneys that the plaintiffs need only show that there was some amount due to the contractor, and that the burden of proof is then cast upon the railroad company to show as matter of defence if the amount due was less than the amount claimed by the plaintiffs. But this statute, although remedial, is in derogation of the common law, and interferes with and seriously affects the contract relations of parties, and must be strictly construed, or at least so construed as not to cast additional burdens upon parties between whom and the plaintiffs there is no privity of contract, unless plainly implied in the language employed. The statute imposes a new duty upon the railroad company,—not that it shall pay the claims of laborers and materialmen on the failure or neglect of the contractors to do so; but the duty imposed is to retain in its custody the amount due from it to its contractors, not exceeding the amount of the claims furnished, until such contractors or sub-contractors pay such claims. It is in effect a garnishment or stop-order of the amount due to the contractor. No provision is made for voluntary payment by the com-

pany to the laborer or material-man, but they are permitted to collect pay for the claim by action against the railroad company.

The burden of proof is upon the plaintiffs to show that their rights to collect such pay exist under the statute, and it is as much incumbent on them to show the amount of the indebtedness of the railroad company to its contractors, as it is for a plaintiff to show the amount a garnishee is indebted to the principal defendant.

But they must go still further, and show that the claim or claims which they seek to collect pay for are not only undisputed, but acknowledged to be due from the contractor or sub-contractors. This is very important, and lies at the foundation of the right to recover. Evidence that the claims are undisputed and acknowledged to be due is the only protection which the company would have against being compelled to pay the amount again to the contractor. The design of the law appears to be to effect a statutory novation of the debt due by the company to the contractor, and make it due and payable to the contractor's creditor.

The evidence should be satisfactory upon this point, but the railroad company has it in its power to protect itself by notifying the contractor or sub-contractor of the pendency of the suit, and thus give to such contractor the opportunity of showing that the claim is disputed or not acknowledged as being due from him.

The claims protected by the statute are assignable, and may be enforced by the assignee in the same manner and to the same extent as the assignor could have done.

The present case shows that the defendant railroad company contracted with W. V. McCracken & Co. to construct and grade a portion of its railroad. McCracken & Co. sublet a portion of the work to McLane & Wilson, and they in turn entered into a sub-contract with one Harvey S. Haywood.

The plaintiffs were engaged in merchandising, under the name of Dudley Brothers, at Byron. The largest portion of the claim for which a recovery was had in the court below was for the indebtedness of the sub-contractor Haywood. Their claims against the railroad company, which they hold in their own right, are based upon orders drawn by Haywood, a copy of one of which is as follows:

" \$2.50

11th, 2, 1885.

Dudley Bros.:

Please let C. H. Closeman have merchandise to the amount of two dollars and fifty cents.

October time.

H. S. Haywood."

On orders such as this they delivered to the men presenting them goods from their store, amounting to \$149.73. Haywood charged the orders directly to the person in whose favor they were drawn as so much paid to him.

ORDERS DID NOT
CONSTITUTE AN
ASSIGNMENT.

The question presented is, Did these orders so drawn and received by Dudley Brothers constitute an assignment of the claim of the laborer for the amount due him for labor from Haywood? We do not discover how it can operate as an assignment of the laborer's claim for labor performed for Haywood. Haywood treated the order as payment to the laborer, and the laborer had no claim against Haywood after receiving the amount the order called for, either in goods or money. The case cannot be distinguished from *Martin v. Michigan & O. R. Co.*, 26 Am. & Eng. R. R. Cas. 351.

Plaintiffs are the assignees of twenty-eight other claims. These are mostly based upon orders drawn by Haywood, some in favor of laborers, some in favor of persons who have boarded laborers, for the board of such persons, some for the boarding or keep of teams, some for hay, feed, and other supplies, and some for material. It need not be repeated that nothing but claims for labor and material used in constructing or repairing the railroad is protected by the statute, which excludes a large part of the claims assigned to plaintiffs.

TESTIMONY OF
THE DIRECTOR.

The only evidence offered on the trial to show the amount due from the defendant to its contractor was the testimony of Mr. Corson. He says he presented a list of the claims held by plaintiffs to James M. Ashley, Jr., who was one of the directors, and at that time superintendent or manager of the construction for the railroad company, and told him unless the contractors paid these amounts they should claim the amount of these claims against the company. He says: "We talked the matter all over at that time, and he said he would try and have them paid, and thought possible some of them would be paid at that pay-day in December." This testimony the court thought sufficient to submit to the jury as tending to prove that the company owed its contractors, and from which they must find the amount of such indebtedness was equal to the amount of the plaintiffs' claim.

The testimony of Corson neither proved that defendant owed its contractors, nor the amount, if any, of such indebtedness, and the case should have been taken from the jury upon this point, as was requested by defendant's attorney.

The judgment of the circuit court must be reversed, and a new trial ordered.

The other justices concurred.

Liability of Company to Laborers employed by Contractors in Constructing Road.—See *St. Louis, etc., R. Co. v. Cobb*, 2 Am. & Eng. R. R. Cas. 643; *Bottomley v. Port Huron, etc., R. Co.*, 6 Ib. 605; *Martin v. Michigan & Ohio R. Co.*, 26 Ib. 351.

BROWN *et al.*

v.

DIBBLE.

(Advance Case, Michigan. April 21, 1887.)

A party agreed to pay a fixed sum to a railroad company, one half within thirty days after the construction of the road from Toledo to Marshall, and the other half when the company should establish and construct the general repair shops at Marshall. *Held*, that the agreement required that the company should have a road under its control covering the entire distance, and having its repair shops at Marshall for the whole road; that the contract was not satisfied by the company securing access to Toledo over another road; that the improvement contemplated by the contract is a permanent one, although it is not necessary that the railway company should literally build the road to Toledo.

Railroad Act, art. 2, § 30, does not authorize the persons constituting the board therein provided for to issue a certificate signed by one of their number as chairman, and by a person employed as their secretary, describing themselves as the "board of railroad consolidation."

A certificate of a secretary of a railroad purporting to recite proceedings of a meeting of stockholders to authorize a consolidation of roads, which is not shown to come from any book of records, and is contradicted as to its recital that said secretary and a large stockholder, who acted as chairman, were there, by the testimony of said persons that they were not there, fails to prove any such proceedings by the company.

In the absence of evidence showing a valid consolidation of two railroads, an assignee of the alleged consolidated company cannot sue on a contract made with one of the roads out of which the consolidated company was formed.

ERROR to circuit court, Calhoun county.

Miner & Stace, William H. Porter, and John B. Cohen for plaintiffs and appellants.

J. C. Fitzgerald and John C. Patterson for defendant.

CAMPBELL, C.J.—Plaintiffs, who are railway contractors, presented a claim against the estate of Charles P. Dibble, deceased, for \$5000, upon an alleged agreement by him to pay to the Toledo & Milwaukee R. Co. half of that sum within 30 days after FACTS. the construction of a railroad from Toledo to Marshall, and the other half when said company should establish and construct the general repair-shops of the road at Marshall. This contract was dated October 16, 1882. The declaration claims a performance on December 1, 1883, which was the limit of time fixed by the contract for the road to go into operation. The Toledo & Milwaukee R. Co. was a Michigan company, organized in 1879 to construct a

road from the State line, where crossed by the Toledo & Ann Arbor R. to Allegan. It is claimed that in October, 1883, the Toledo & Milwaukee R. Co. became consolidated with an Ohio company called the Toledo & Michigan R. Co., alleged to have been incorporated in Ohio, to construct and operate a railroad from Toledo to the point on the State line where the former road was to start. This new combination was to be called the Michigan & Ohio R. Co. On the 23d day of November, 1883, the consolidation entered into a contract with the Toledo & Ann Arbor R. Co. to obtain the use of the line of the latter company from Dundee across the State line to Toledo, covering the entire and only line which the Toledo & Michigan Co. had been organized to build, and the southeastern part of the Toledo & Milwaukee road. The purpose was stated to be for "avoiding the expense of building an independent track over so much of the line adopted by it as already covered by the track of the Ann Arbor Co." The line to Marshall was made out by including this leased line. Plaintiffs claim as assignees of the consolidated company. The claim was rejected by the commissioners for lack of sufficient evidence to sustain it, and in the circuit court, on appeal, a verdict was ordered for the defendant on several grounds, relating both to the sufficiency of the consolidation and the completion of the contract. There was also some question whether Mr. Dibble was shown to have delivered his agreement at all.

As the claim was tried before the estate commissioners as well as at the circuit, and as a new trial was refused at the circuit, it may perhaps be assumed as probable that the defects in proof did not arise from oversight. But as any ruling made on the present state of the record would not preclude a sufficient showing, if it is possible to make it, as against other parties, we shall not do more than seems desirable to settle the present controversy.

As the suit is brought by the assignee of a consolidated company on a contract made with an original and single company confined to this State, the question whether the consolidation is good for other purposes cannot settle the case. Unless the consolidation is shown to be the legally created successor of the old Michigan company, it has no concern with its individual contracts with third persons; and, if so identified, it can only have or give to its assignees a right to recover by proof that all conditions of recovery have been complied with. There is nothing in the record to show what the law of Ohio is concerning the organization or consolidating of railroad companies. The Toledo & Michigan Co. purports to be organized under a voluntary agreement much more vague than would be allowed by our statutes, and which, while it is possibly good and sufficient to make a corporation in Ohio, is not shown to be so; and, had it been shown to be legally incorporated, the record

CONSOLIDATION
—RIGHT TO RE-
COVER ON OLD
COMPANY'S CON-
TRACTS.

is still defective in not showing that it could lawfully become amalgamated with a Michigan company, or that it could lawfully take a lease covering its entire proposed line, and abstain from building any part of it. Neither of these things can be presumed, and neither is shown.

There is also an entire failure to show, by legal evidence of any one knowing the facts, such a publication of notice to stockholders of the proposed meeting to bring about consolidation as is required by law. The records of the company do not show that evidence of a notice was perpetuated by an affidavit, as is allowed by article 2, § 3, of the railroad act. No attempt was made to prove the publication of notice by any one connected with the papers, or by any one who had seen the notices, and could identify them. Mr. Neal, the secretary, who swore in a general way to the publication, showed on cross-examination that he knew nothing about it. As there is usually no difficulty in getting access to newspaper files, the case was not one for loose assumptions, and some form of legal proof should have been given. The only proof of what was done at the meeting of the Michigan company, held September 11, 1883, to consent to the consolidation, is a certificate of Mr. Neal, the secretary of that company, dated October 6, 1883. Whether this came from any book of records does not appear. By the recital of these proceedings it is stated that Mr. Latcha was made chairman and Mr. Neal secretary of the meeting, and that there were present 14,505 shares in person or by proxy; but who were present as holders, and who as proxies, does not appear. Mr. Latcha was sworn as a witness, but does not prove there was any such meeting. Mr. Neal, who purports to have been there as secretary, swears he was not there at all, and testifies that one Lamb held both his and Latcha's proxies. There was therefore no proof at all that the Michigan company did what it purported to have done.

Neither was it shown that the board provided for by section 30 of article 2, consisting of the attorney-general, commissioner of railroads, and secretary of state, acted upon and approved the consolidation. There is a certificate purporting to be signed by the railroad commissioner, William P. Innes, and by Maj. Ransom, describing themselves as chairman and secretary of the "board of railroad consolidation," but not signed by the attorney-general and secretary of state. As there is no statute providing that the three gentlemen constituting the board shall organize under the name used, or appoint one of their number chairman, and employ a secretary not of their own number, we do not think that this certificate alone was sufficient, although it was quite probable the board really undertook to act. Without deciding whether or not facts enough may have not ex-

MEETING OF
STOCKHOLDERS
—SECRETARY'S
CERTIFICATE.

BOARD OF CON-
SOLIDATION, CER-
TIFICATES OF.

isted to authorize a consolidation, there was no legal evidence of it, and therefore no cause of action was made out.

But, in one view of the case, it may be proper to consider whether, if there was a consolidation in law, there was any cause of action made out. The Toledo & Milwaukee Railway was by its articles to begin at the Ohio State line, so as to have a continuous line of its own from Marshall to that point. Whether it would be

SUBSCRIPTION —
PERFORMANCE
OF THE CONDI-
TION.

allowed to continue to Toledo would be determined by the laws of Ohio, which are not in evidence. The alleged agreement on which suit is brought recites the consideration for Mr. Dibble's promise, and his promise itself, in this way: "Whereas, the Toledo and Milwaukee R. Co., a corporation duly created and existing under the laws of the State of Michigan, propose to establish and construct a line of railway from Toledo, in the State of Ohio, through Marshall, Michigan; and whereas, said company propose to establish and construct the general repair-shops of said road at the city of Marshall; now, therefore, I request said railway company to build said railway, and establish and construct said shops, and in consideration of one dollar to me in hand paid, and the further consideration of the benefits I shall receive from said railway, and for the purpose of encouraging the construction of the same, and for the further consideration of the compliance with my request to build said railway, I hereby agree to pay to said Toledo & Milwaukee R. Co., or order, the sum of five thousand dollars; one half of said sum to be due and payable when said company shall construct or secure a continuous line of railway of the standard gauge from Toledo to Marshall, or within thirty days thereafter, and the other half of said sum to be due and payable when said company shall establish and construct the general repair-shops of said road at said city of Marshall, or within thirty days thereafter; provided, however, that said road shall be in operation from Toledo to Marshall by the first day of December, 1883, and that said shops shall be constructed within one year thereafter." In case the shops were removed within 10 years, \$2500 was to be refunded.

The first train ran from Toledo to Marshall on one of the latter days of November. But the company never built any road beyond Dundee, and the whole distance from Dundee to Toledo, more than half of which was in Michigan, was run over the Toledo & Ann Arbor road, under an arrangement made on the twenty-third of the same month of November, 1883. This was not a lease of the section from Dundee southward, but was a permission to use the track and appurtenances in common with the Ann Arbor road, at a rate of \$800 a month for four years, and \$1000 a month thereafter, and a fair share of the cost of maintenance. The road was to continue in the possession and control of its owners, and all persons employed by either road were to be under the direction

and subject to suspension or dismissal by the Ann Arbor Co. The privilege was subject to termination on 30 days' notice, upon any default. After five years, the Ann Arbor Co. could terminate it, and after 18 months the licensee could do so. All local business between Dundee and Toledo was to belong to the Ann Arbor Co. We do not think this was such an arrangement as was contemplated by Dibble. While it was not necessary that the railroad company should literally build the road to Toledo, it was evidently expected that it should have a road under its own control covering the entire distance, and having its repair-shops at Marshall for the whole road. The improvement was contemplated as a permanent one. Provision was made for a return of half the money when the repair-shops should be moved, but none was made for the more serious risk of a stoppage of the road itself short of Toledo. The loss of the work on the Toledo end of the road up to Dundee would make some difference in the amount of repairs to be provided for, and the amount of business tributary to Marshall might be very much less where the company owning the Toledo end of the road could have precedence for its own trains, as well as access to much of the same county. The language of the contract is too definite to be satisfied with access to Toledo over some other company's road, and it must be read as the parties made it.

In the view of the circuit court, no performance was shown, and we think that view correct. The judgment must be affirmed, and certified down; defendant to recover costs throughout.

The other justices concurred.

Conditional Subscriptions.—See next case and note.

Subscription Conditioned on Building Road between Two Points—What is Compliance.—A condition contained in a subscription to the stock of a railroad company that the road shall be located over a certain route, is valid, and the subscription cannot be enforced if the condition is not complied with,—subject to the provision that the location designated is within the purview of the charter. 1 Woods Ry. Law, 68; Nashville, etc., R. Co. v. Baker, 2 Coldw. (Tenn.) 574; Charlotte, etc., R. Co. v. Blakley, 3 Strobb. (S. Car.) 245; Miller v. Pittsburg, etc., R. Co., 40 Pa. St. 237; Burlington, etc., R. Co. v. Boestler, 15 Iowa, 555; Swartwout v. Michigan Air Line R. Co., 24 Mich. 389; Des Moines Valley R. Co. v. Graff, 27 Iowa, 99; Woonsocket, etc., R. Co. v. Sherman, 8 R. I. 564; Warner v. Callender, 20 Ohio St. 190; Smith v. Allison, 28 Ind. 366; Brownlee v. Ohio, etc., R. Co., 18 Ind. 68; North Missouri R. Co. v. Winkler, 29 Mo. 318; North Missouri R. Co. v. Miller, 34 Mo. 19; Buffalo, etc., R. Co. v. Pottle, 28 Barb. (N. Y.) 21; Jewett v. Lawrenceburg, etc., R. Co., 10 Ind. 539; McMillan v. Maysville, etc., R. Co., 15 B. Mon. (Ky.) 218; Chamberlain v. Painesville, etc., R. Co., 15 Ohio St. 225; Ashtabula, etc., R. Co. v. Smith, 15 Ohio St. 328; Paris, etc., R. Co. v. Henderson, 89 Ill. 86; Cooper v. McKee, 53 Iowa, 239; Detroit, etc., R. Co. v. Staines, 39 Mich. 698; Henderson, etc., R. Co. v. Leovill, 18 B. Mon. (Ky.) 358; Martin v. Pensacola, etc., R. Co., 8 Fla. 370; Trott v. Sarchett, 10 Ohio St. 241; Mansfield, etc., R. Co. v. Brown, 26 Ohio St. 223; Parks v. Evansville, etc., R. Co., 23 Ind. 567; Parker v.

Thomas, 19 Ind. 213; Rhey v. Ebensburg, etc., Plank Road Co., 27 Pa. St. 261; Cumberland Valley R. Co. v. Baub, 9 Watts (Pa.) 458; Caley v. Philadelphia, etc., R. Co., 80 Pa. St. 868; Bucksport, etc., R. Co. v. Brewer, 67 Me. 295; Merrill v. Reeves, 50 Iowa, 504; Agricultural, etc., R. Co. v. Winchester, 8 Allen (Mass.), 29; First National Bank v. Harford, 29 Iowa, 579; Spartanburg, etc., R. Co. v. Graffenreid, 12 Rich (S. Car.), 275; Taggart v. Western Md. R. Co., 24 Md. 563; Racine Co. Bank v. Ayres, 12 Wis. 512; Mich. Midland & Canada R. Co. v. Bacon, 33 Mich. 466; Iowa, etc., R. Co. v. Bliobenes, 41 Iowa, 267; Toledo, etc., R. Co. v. Johnson, 49 Mich. 148; Cayuga Lake R. Co. v. Kyle, 5 T. & C. (N. Y.) 659; Cedar Rapids, etc., R. Co. v. Spofford, 41 Iowa, 292; Berryman v. Cincinnati So. R. Co., 14 B. Mon. (Ky.) 755; Moore v. Hanover Junction R. Co., 94 Pa. St. 324; Crane v. Indiana, etc., R. Co., 59 Ind. 165.

Where the condition of certain subscription notes is that the road be built between two points mentioned, the construction of the line for a portion of the way and its operation for the balance of the way on a leased line will not constitute a compliance with the condition. Cooper v. McKee, 53 Iowa, 239; Lawrence v. Smith, 57 Iowa, 701. But in People v. Holden, 82 Ill. 98, it was held that where the condition was that the road should be completed and in operation between two towns named, within five years; and within three years it was completed to within a mile, as to one of the towns; and from that time, by connecting with the track of another road over that mile, ran its trains and supplied all the demands of the travelling public between the two towns,—there was a substantial compliance and the subscription was collectible.

WEMPLE *et al.*

v.

ST. LOUIS, JERSEYVILLE AND SPRINGFIELD R. CO.

(*Advance Case, Illinois. March 23, 1887.*)

The defendants gave their note to the plaintiff railroad company promising to pay to it a certain sum on a fixed day, conditioned that it was not to be paid unless the company constructed its road "so that cars may be run over the same between the points named above on or before the 1st day of January, 1882," but if this should be done the note was to be paid, "and five shares of the capital stock of said railroad, amounting to the sum of \$500, shall be issued to the maker hereof." *Held:*

1. That the contract only required that the stock shall issue after payment is made; that the limitation of time applied only to the construction of the railroad; that the contract was a subscription to the capital stock and not a purchase of shares; that the payment of the subscription made the subscriber a stockholder without reception of the certificate of shares; and that no tender of the certificate was required to enable the appellee to recover on the subscription.

2. That it was proper, in a suit to recover the subscription, for the court to instruct the jury that "although the jury may believe from the evidence that on the 1st day of January, 1882, the railroad in question was not perfectly built, or even well built, between the points named in the contracts in evidence, yet if it was so constructed at that time that cars could be and were safely run over its tracks between the points named,—such a condition of

tracks is a sufficient compliance with the contract, so far as condition and quality of construction are concerned."

APPEAL from a judgment of the appellate court, third district, affirming the judgment of the Morgan circuit court against the defendants in an action upon a subscription to the capital stock of a railroad. Affirmed.

On the 12th day of January, 1881, the appellee, being about to undertake the construction of a railroad from a point on the Mississippi River to Springfield, or to a connection with Springfield by way of Jerseyville, Waverly, and other points named, sought aid from the citizens along the route of the proposed road. On that day appellants executed and delivered to the company the following instrument:

"\$500. Waverly, Ill., January 12, 1881.

"On the 1st day of January, 1882, I promise to pay to the order of the St. Louis, Jerseyville & Springfield R. Co. the sum of five hundred dollars, with interest from maturity at the rate of 8 per cent per annum, payable at the office of Wemple Brothers, Waverly, Illinois. The condition of this note is such that, whereas the St. Louis, Jerseyville & Springfield R. Co., duly incorporated according to the laws of the State of Illinois, agrees to construct or cause to be constructed a railroad from a point on the Mississippi river, at or near Grafton or Jersey Landing, in Jersey county, Illinois, via Jerseyville, to or near Medora, to or near Chesterfield, to or near Palmyra, all in Macoupin county, Illinois, and to or near Waverly, in Morgan county, Illinois, thence to Springfield, Illinois, or with a railroad connection with Springfield, Illinois—now, if said railroad shall be so constructed so that cars may be run over the same between the points above-named on or before the 1st day of January, A.D. 1882, then this note shall be well and truly paid, and 5 shares of the capital stock of said railroad, amounting to the sum of \$500, shall be issued to the maker hereof; otherwise this note shall be null and void. Unless said railroad shall be built within a half-mile of the centre of the public square in the city of Waverly, this note to be absolutely null and void.

"WEMPLE BROTHERS."

On the 21st and 26th days of January, 1881, appellants executed to the appellee two other contracts of like effect, for \$300 and \$200 respectively.

To raise the funds with which to construct the railroad, appellee assigned these instruments to James F. How, and suit was instituted in his name, whereupon a demurrer was interposed, and, the court holding they were not negotiable, the declaration was amended by making the appellee plaintiff, who sued to the use of How.

On the trial various questions were raised, and it resulted in a verdict and judgment for appellee, on the three instruments, for \$1267.55.

The following instructions, among others, were asked by the plaintiff and given by the court on the trial, and duly excepted to:

No. 1. "The court instructs the jury for the St. Louis, Jerseyville & Springfield R. Co., that this suit is instituted on three written contracts, in evidence, and if the jury find from the evidence that the plaintiff did, on or before the 1st day of January, 1882, either construct or cause to be constructed a railroad to such a condition of completion as that cars could be run over the same from a point on the Mississippi river, at or near Jersey Landing, in Jersey county, Illinois, by way of Jerseyville, to or near Medora, to or near Chesterfield, to or near Palmyra, in Macoupin county, Illinois, and to Waverly, and within a half-mile of the centre of the public square in Waverly, and thence to Bates, in Sangamon county (if the evidence shows that Bates is a point with a railroad connection with Springfield), and at Bates connected such road with the Wabash, St. Louis & Pacific R. Co.; and if the jury further believe from the evidence that on the 8th day of February, 1882, the plaintiff caused the three certificates of stock in evidence to be tendered to the defendants, and demanded the payment of the sums of money specified in said contracts; and if the evidence also shows that the plaintiff has brought said certificates of stock into court, and in open court tendered the same to the defendants; and if the evidence shows that the defendants on said 8th day of February, 1882, failed and refused to pay the plaintiff the sum of money specified in said contract, or any part thereof, and refused to take said certificates of stock or pay any part of said several sums of money,—then the jury should find their verdict for the plaintiff, and assess its damages at the amount of the sum of the several contracts, together with interest thereon at the rate of eight per cent per annum from the said 8th day of February, 1882, to the present time."

No. 8. "The court also instructs the jury that the stock of an incorporated company which has not been delivered, is in the legal custody and control of the officers whose duty it is to issue and deliver it; and they have the legal right, at any time before it is delivered, to alter and change, by writing on the certificates the name of the place at which such certificates can be transferred, so as to make such place conform to the true place of transfer, and so as to comply with the laws of Illinois. And if the jury find from the evidence that the certificates in evidence were so printed as to make them transferable on the books of the company in New York; and if the evidence shows that the offices of the plaintiff were in the city of Jerseyville, in Illinois,—then the president of the company had the legal right to erase the words 'New York'

and insert the words 'Jerseyville, Illinois,' in place of New York, at any time before they were delivered to or accepted by the defendants; and if the evidence shows that the certificates in evidence were tendered to defendants on the 8th day of February, 1882, and that they refused to receive them on the ground that the company had not complied with its contract, and made no objection to them on account of the place of transfer, then, so far as the right of the company of recovering on the contracts in evidence is concerned, it makes no difference in law whether the words 'New York' were erased, and 'Jerseyville, Illinois,' inserted in the certificates, before or after they were tendered to the defendants."

No. 11. "The court also instructs the jury for the plaintiff, that although they may believe from the evidence that Cross, as the agent of the railroad company, went to Waverly early in January, 1882, and demanded the payment of the contracts in evidence, of the defendants, without giving or offering to give to the defendants any certificates of stock, yet such fact constitutes no bar in law to the right of the plaintiff to make a tender of the stock on the 8th day of February, 1882, and at the time specified, and prior to the commencement of this action, and to demand the payment of such contracts at a later day; and if the evidence shows that such certificates of stock were tendered by the president of the plaintiff to the defendants before the commencement of this suit, the prior demand of payment made by Cross, without offering the certificates to the defendant, will not in law prevent the plaintiff from recovering a verdict in this case."

No. 14. "The court also instructs the jury for the plaintiff that the terms of the contracts in evidence only require the plaintiff to construct or cause to be constructed a railroad from a point on the Mississippi river, at or near Jersey Landing, through the points named to the place in railroad connection with Springfield to a degree of completion,—which was so cars could be run over it; the contracts do not require that it should be perfectly finished and completed to such a degree of perfection as that it would be equal to older and first-class roads; and if the evidence shows that the degree of completion so attained was that the cars could be and were in fact run upon the road from a point on the Mississippi river, at or near Jersey Landing, through all the points named, and within one half-mile of the centre of the public square in Waverly, thence to a point in railroad connection in Springfield, Illinois, on the first day of January, 1882, then such a degree of completion was a sufficient compliance with the requirements of the contract in that respect."

No. 15. "Although the jury may believe from the evidence that on the 1st day of January, 1882, the railroad in question was not perfectly built, or even well built, between the points named

in the contracts in evidence, of it was so constructed at that time that cars could be and were safely run over its tracks between the points named,—such a condition of tracks is a sufficient compliance with the contract so far as condition and quality of construction is concerned.”

No. 19. “The court instructs the jury for the plaintiff that, under the contracts in evidence in this case, the plaintiff was not bound to issue or deliver the stock specified in said contracts on or before the 1st day of January, A.D. 1882, and that the tender of such stock at a time prior to the commencement of this suit would be a compliance with the contract upon that point.”

No. 23. “The court also instructs the jury that if the evidence shows that the tender was made of the certificates of stock in evidence, on the 8th day of February, 1882, by plaintiff to defendants, and at that time the words ‘New York’ had not been erased and the words ‘Jerseyville, Illinois,’ had not been inserted; and if the evidence shows that no objection thereto was made by defendants on account of the specification of New York as the place of transfer,—then, in law, that objection was waived by defendants, and cannot now constitute any valid legal objection to such certificates of stock or to the tender thereof.”

The defendants then asked, and the court gave as asked, instructions numbered 1, 2, 3, 4, and 5.

No. 1. “That if they believe from the evidence that Locke, the president, and Cross, the secretary of the company, issued the stock certificates mentioned in evidence without any action of the board of directors of the company authorizing the same, then such action of said officers was without authority, and the certificates were invalid, and the defendants would not be bound to accept the same if offered to them.”

2. “Under the contracts in evidence in this case, on which the plaintiff has sued, the plaintiff was required to do two things before the defendants were bound to pay the money specified in the contracts: first, the plaintiff was required to construct the road from its termini named in the contracts, and was also to deliver to defendants the stock named in the contracts; and, even if the evidence should show that on the said 1st of January the said road had been completed according to said contracts, still if the evidence further shows that when the demand was made for payment the said plaintiff was unable to deliver said stock to the defendants, then, in law, the plaintiff has not complied with its part of the contracts and cannot recover on said contracts; and the question as to whether said stock is valuable or not is immaterial in this case. The defendants, having contracted for the stock, cannot be put in default until it is delivered or offered to be delivered to them.”

No. 3 “The court instructs the jury for the defendants that

they are to find their verdict in this case from a consideration of all the evidence in the case, and that in finding their verdict they must find the same from a preponderance of all the evidence in the case; that a preponderance means the weight or strength of the evidence in the case."

No. 4. "The court further instructs the jury for the defendants that the plaintiff has brought suit on the several contracts, by each of which the plaintiff has alleged a readiness and willingness to perform its obligations, and an offer to perform its obligations as specified in said several contracts; and, before the plaintiff can legally recover a verdict, the jury must believe from the evidence in the case that said plaintiff did perform, or offer to perform, said contracts substantially as alleged; and, if they do not so find from the evidence, they must find a verdict for the defendants."

No. 5. "If the jury find for the defendants, the form of the verdict may be: 'We, the jury, find for the defendants.'"

And the defendants further asked, and the court refused to give, instructions numbered 6, 7, and 8.

No. 6. "That, if they believe from the evidence that the certificates of stock in evidence were issued and signed without any interlineation on the face of the same, as they now appear, and that the same was altered or changed by the president of the railroad company, then the defendants were not bound to accept and receive the same."

No. 7. "The court further instructs that the plaintiff has alleged in his declaration in this case that said plaintiff did build or cause to be built the railroad mentioned to a point on the Mississippi River, at or near Grafton or Jersey Landing, on or before January 1, 1882, substantially as provided for in said special contracts sued on. And the plaintiff has also alleged in its declaration that it was ready, willing, and offered to deliver to the defendants the five certificates of shares of the capital stock of said railroad company on the said 1st day of January, 1882, on the payment of the money mentioned; and if they believe from the evidence in the case that said plaintiff was not ready, willing, and able to deliver said shares of stock on said 1st day of January, but that said plaintiff, by its agents, presented said contracts on January 2, 1882, and demanded payment, and one of the defendants thereupon called for said shares of stock, and the agent of the plaintiff presenting said contract failed to produce the same, and said in substance that he did not have said stock,—then the defendants had the legal right to treat such failure to deliver the stock as a breach of said obligation, and was not bound after that to pay the money mentioned, and the defendants are entitled to a verdict."

No. 8. "The court further instructs for the defendants that the special contracts sued on provided, in legal effect, that, as a condi-

tion precedent to a right to demand the payment of the money, the railroad company should construct its road from and through the points named to a point on the Mississippi river, at or near Grafton or Jersey Landing, on or before January 1, 1882; and, on the so building of the road within the time specified, that it would deliver to the defendants the stock of the company mentioned on the payment of the money. And under said special contracts sued on the plaintiff was bound to be ready, able, and offer to deliver said shares of stock on or before the 1st day of January, 1882, on the payment of the money by the defendants; otherwise it cannot recover. And although they may believe from the testimony that the railroad was built to Jersey Landing by the plaintiff on or before January 1, 1882, substantially as agreed to be done, still, if they also further find from the evidence that the railroad company failed and neglected to have ready and offer to deliver said stock within the time specified; but that on the 2d day of January, 1882, the said railroad company, through its agent, presented said contracts and demanded payment, and at the same time defendants asked for said stock; and that the said agent, in substance, said that he did not have it, and failed to deliver, or offered to deliver, said stock; and that the defendants therefore refused to pay the money,—then the defendants had the right to treat such failure, if it appears from the evidence, as a breach of said contracts, and no tender of the stock after that would give the plaintiff the right to recover in this case.”

Morrison & Whitelock for appellants.

Brown & Kirby for appellee.

SCHOLFIELD, J.—Two questions are presented upon this record for our decision: 1. Does the instrument on which suit is brought
FACTS. require that the certificates of five shares in the capital stock of the railroad company shall be issued and tendered to the appellants on the 1st day of January, 1882? 2. Was it in compliance with the agreement expressed in the condition in that instrument that the railroad was so constructed that cars could be and were safely run over its track upon the line, and within the time prescribed, as the circuit judge instructed the jury.

1. The instrument reads as follows:

“\$500.

Waverly, Ill., January 12, 1881.

“On the first day of January, 1882, I promise to pay to the order of the St. Louis, Jerseyville & Springfield R. Co. the sum of \$500, with interest from maturity at the rate of 8 per cent per annum, payable at the office of Wemple Brothers, Waverly, Illinois. The condition of this note is such that, whereas the St. Louis, Jerseyville & Springfield R. Co., duly incorporated according to the laws of the State of Illinois, agrees to

construct, or cause to be constructed, a railroad from a point on the Mississippi river, at or near Grafton, or Jersey Landing, in Jersey county, Illinois, via Jerseyville, to or near Medora, to or near Chesterfield, to or near Palmyra, all in Macoupin county, Illinois, and to or near Waverly, in Morgan county, Illinois; thence to Springfield, Illinois, or with a railroad connection with Springfield, Illinois; now, if said railroad shall be so constructed so that cars may be run over the same between the points named above on or before the 1st day of January, 1882, then this note shall be well and truly paid, and five shares of the capital stock of said railroad, amounting to the sum of \$500, shall be issued to the maker hereof; otherwise this note to be null and void. Unless said railroad shall be built within a half-mile of the centre of the public square, in the city of Waverly, this note to be absolutely null and void.

“WEMPLE BROTHERS.”

It will be observed that the first undertaking is an unqualified promise by appellants to pay to the order of appellee \$500 on the 1st day of January, 1882, with interest, etc.; but after this comes the condition; that is, the agreement that they shall not be obliged to perform this promise unless appellee shall perform the second undertaking, which is to construct or cause to be constructed a railroad, etc., “so that cars may be run over the same between the points named above on or before the 1st day of January, 1882;” and if this shall be done, it is expressly said the “note shall be well and truly paid.” The liability will then be absolute; and it is afterwards added, “and five shares of the capital stock of said railroad, amounting to the sum of \$500, shall be issued to the maker hereof.” This can, in our opinion, in the connection that it occurs, only mean that the stock shall issue after the payment is made. The limitation of time plainly applies only to the construction of the railroad. When, it was constructed on the line and within the time stipulated, the condition which alone prevents the undertaking from being absolute was discharged, and the instrument then in legal contemplation was to be read with the condition eliminated, as thus: “On the first day of January, 1882, I promise to pay to the order of the St. Louis, Jerseyville & Springfield R. Co. the sum of \$500, with interest from maturity at the rate of 8 per cent per annum, payable at the office of Wemple Brothers, Waverly, Illinois; and five shares of the capital stock of said railroad, amounting to \$500, shall be issued to the maker hereof.”

The contract is a subscription to the capital stock, and not a purchase of shares. *Ottawa, O. & F. R. V. R. Co. v. Black*, 79 Ill. 262; *Wellersburg v. West M. P. R. Co.*, 12 Md. 476. And see also *Goshen & M. Tpke. Co. v. Hurin*, 8 Johns. 217.

The rule is, where no formalities are prescribed, any agreement

by which a person shows an intention to become a shareholder, upon the terms set forth in the company's charter, is sufficient to constitute a contract of subscription. Morawetz Priv. Corp. § 269.

Payment of the subscription makes the subscriber a stockholder. The certificates of shares are but the evidence of the fact (1 Rorer R. R. p. 103; Morawetz Priv. Corp. § 258; Ang. & Ames Corp. (5th ed.) § 565; Chandler v. Northern C. R. Co. 18 Ill. 190; New Albany & S. R. Co. v. McCormick, 10 Ind. 499; Miller v. Wild Cat Gravel Road Co., 52 Ind. 51); and no tender of the certificates of shares was therefore necessary in order to enable the appellee to recover on the subscription. Morawetz Priv. Corp. § 282, and authorities cited in note 3.

2. The condition specifies only that the road shall be "so constructed that cars may be run over the same." The instruction of the court followed this language substantially. Clearly no greater degree of completeness or perfection of the road was intended, or it would have been specified. We think the court did not err in its construction of the condition in this respect. The question of fact was for the jury, and the finding of the appellate court relieves us of any inquiry in that respect.

We think the judgment of the appellate court was right, and it must therefore be affirmed.

Conditional Subscriptions.—See Saginaw, T. & H. R. Co. v. Chappel, 22 Am. & Eng. R. R. Cas. 16; Braddock v. Philadelphia, etc., R. Co., 16 Ib. 439, and note; Curry v. Board of Supervisors, 13 Ib. 80-83; Lynch v. Eastern L. F. & M. R. Co., 12 Am. & Eng. R. R. Cas. 678; note to Moore v. Hanover, J. & D. R. Co., 4 Ib. 256.

Difference between Sales of Shares and Subscriptions.—The decision in the principal case turns upon this point. It is clearly expressed by Morawetz in his work on Corporations. He says: "The issue of new shares by a corporation may take the form either of a sale and purchase of the shares, or of an ordinary subscription. There is an important difference between the two classes of contracts. When a person agrees 'to take' or 'to purchase' shares, the intention is to buy the certificates representing the shares as salable securities. . . . Whether a contract with a corporation is a contract to purchase shares, or a contract of present membership, depends on the intention of the parties. If payment of the price and delivery of the certificates are intended to be concurrent acts, the transaction will clearly be a purchase and sale. But if it is contemplated that the party contracting with the company shall have any of the rights of the shareholder before the whole amount of the shares has been paid, the contract must be treated as a contract of membership."

In St. Paul, etc., R. Co. v. Robbins, 23 Minn. 440, the agreement to take the stock of a corporation was in the following words and figures, to wit: "We, the undersigned, do hereby subscribe to the preferred capital stock of the St. Paul, Stillwater & Taylor's Falls Railroad Company, and promise to pay for the number of shares set opposite our respective names; these subscriptions not to be binding until sixty-five thousand dollars of said stock is

subscribed for. Date: October, 1872; name of subscriber: Daniel M. Robbins; No. of shares: 20; par value: \$2000;" taken in the stock subscription book of the company, authorized by it to be opened to receive such subscriptions, and the issuance of such preferred stock having been duly authorized by it. This agreement was construed by the court as an agreement to buy certificates of shares, and it was held that the delivery of the certificates and payment of the purchase-price should be concurrent acts. The court says: "It appears from the complaint that, at the time of this subscription, the company was fully organized, so that it does not stand upon precisely the same footing as a subscription made prior to, and for the purpose of effecting the organization. Such a subscription gives to the subscriber an interest in the corporation, and the right to take part in organizing it, and this interest and right are a sufficient consideration to support his promise. But the subscription in this case does not appear to have been to the original stock. On the contrary, it appears that, after the company was fully organized, its board of directors authorized and directed the issuance of what, in the amended complaint, is called 'preferred capital stock,' and also directed that the company's books should be open to receive subscriptions for the same. The mere subscription to this stock, while it constitutes a valid contract on the part of the company to issue the stock to defendant upon his paying for it, and, on his part, to receive and pay for it, does not give him an interest in the company, nor vest in him the title to the stock. It can be sustained as a contract only on the implied promise of the company to issue the stock to him. No time is appointed, in the writing subscribed, for the payment of the money or the issuance of the stock, except that the subscription should not be valid until \$65,000 of the stock should be subscribed. We regard the two promises as concurrent and dependent, and that neither party could require the other to perform without performing or offering to perform the promise on his part. As plaintiff has neither issued the stock, nor offered to issue it, the action is prematurely brought."

In *Clark v. Continental Imp. Co.*, 57 Ind. 185, by an obligation payable to a certain person or bearer the maker, in consideration of one dollar, the receipt of which was therein confessed, and of the delivery to be made to him by a certain railroad company of a specified number of shares of its capital stock, acknowledged himself to be indebted in a certain sum, which he promised to pay in instalments as the construction of the roadbed of such railroad progressed, in proportion to monthly estimates thereof, and that the whole should be paid on the completion of such roadbed. It was *held*, that such obligation was not a subscription to the capital stock of such company. The court says: "There is no analogy between the case here and that of an ordinary subscription to the capital stock of a railroad company, on which an action may be maintained without having tendered the certificates for the stock. Payment of an ordinary subscription to the capital stock makes the subscriber a stockholder, even if the subscription does not, and he can always demand and obtain the proper certificate. But payment of the obligation sued on would not make the defendant a stockholder in the Grand Rapids & Indiana R. Co. *The obligation is not a subscription to the capital stock of the company*, and he cannot become a stockholder by payment of the obligation sued on, unless the stock is transferred to him."

WOODWARD

v.

AMERICAN EXPOSITION R. Co. (WESTON, Intervenor.)

(Advance Case, Louisiana. May 9, 1887.)

A railroad constructed on soil not belonging to the owner of, or to the corporation which built, the road, is movable property, and, as such, liable to the law regulating pledges on movables.

The pledgee of a railroad may take legal possession, as required by the law on pledges, through a third person chosen by him and the pledgeor.

A party who is bound as indorser with others for the payment of a note secured by pledge is legally subrogated to all the rights of the pledgee by the payment of the note.

A party whose materials sold to another are used in the construction of a work, has no privilege on such work, because his materials were not sold to the owner or his agent or his sub-contractor.

APPEAL from civil district court, Orleans parish.

Braughn, Buck, Dinklespiel & Hart for intervenor and appellant.

E. M. Hudson, W. F. & D. C. Mellen, and *J. P. Horner* for appellee.

POCHE, J.—This case presents a contest between plaintiff and intervenor, both creditors of the defendant company, for preference of payment out of the proceeds of portions of the railway property.

FACTS. Plaintiff is the holder of a note representing the balance of the purchase-price of the rails and other iron appurtenances used in the construction of the road which connected Canal street, in this city, with the grounds of the American Exposition. The note, which had been executed by the defendant corporation in favor of the vendor of the materials referred to, had been indorsed by plaintiff and by other persons, and had been secured by an act of pledge, under which the railroad and all its appurtenances had been placed in the possession of a third party by mutual consent of the contracting parties. After maturity of the note, it was paid by plaintiff, who thus acquired the ownership and possession thereof. In his suit he claimed to have been subrogated, by payment as indorser, to all the rights of the original holder of the note, including the vendor's privilege on the materials sold by the latter, and the right of pledge over the entire property, against which he sued out a writ of sequestration. Intervenor claims a privilege on that portion of the road in the construction of which lumber, which he had sold, was used, such as bridges, cross-ties, etc., and he resists

plaintiff's right of pledge on that part of the work. He prosecutes this appeal from a judgment in favor of plaintiff. The vendor's and furnisher's privilege claimed by intervenor is resisted on the ground that his lumber was not sold to the defendant corporation, or to another person employed by the company, or to its agent or sub-contractor; but it is alleged that the lumber was purchased from intervenor by Cummings & West, a firm which had acquired certain privileges on the exposition grounds, by which firm it had been sold to the exposition, and in turn sold by the latter corporation to the defendant, by which it was used in the construction of the road.

The pivotal question involved in intervenor's contested privilege hinges upon the fact of who was the purchaser of his lumber in the direct sale made by him. If it was purchased by the defendant, or by a person employed by it, or by its agent or sub-contractor, his privilege must be enforced. Rev. Civil Code, art. 3249, § 3. But if the lumber was purchased by Cummings & West, and that from them, through the exposition, it reached the defendant, the case is against him. The note which he holds as representing the purchase-price of the lumber was executed by the exposition management, and made payable to the order of Cummings & West. That circumstance is conclusive proof that the lumber was not sold directly to the railway company; and it is *prima facie* evidence that the lumber had been sold by Cummings & West to the exposition. That presumption is strenuously resisted by intervenor, who contends that Cummings & West were merely intermediaries between the exposition and himself in the negotiations which led to the contract of sale. On this point the voluminous testimony in the record is decidedly conflicting, and fortunately the necessities of the case do not absolutely require a final adjudication thereof. In the face of the overwhelming evidence showing that this lumber was once purchased and owned by the exposition, by purchase either from Cummings & West, or from himself directly, intervenor abandons on appeal the contention that he had dealt in the premises directly with the railway company, but he relies on the theory that, in their purchase of the lumber from him, the officers of the exposition were in effect the agents of the defendant corporation.

From our reading of the record we find that, at the date of the purchase and delivery of the lumber in question, the railway company had not yet been created or organized, and that the officers then contemplated the construction of the railroad at the cost and for the use and benefit of the exposition. But the plan was subsequently abandoned, and a new and distinct corporation was organized, known as the American Exposition Railway Co., by which the road was built and operated, and to which the

exposition sold the lumber which it had acquired for the purpose of building a railroad, and for which it obtained valuable consideration from the defendant company, purchaser. These facts are effectively destructive of the pretensions of intervenor, who is thus left without a vendor's privilege, or the privilege of the furnisher of materials used in the construction of a work.

As to the privilege set up by plaintiff on the whole road, it clearly results from the record, and from the law applicable to the

ROAD CON-
STRUCTED ON
SOIL OF ANOTHER
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PERTY.

case. As the railroad was constructed on the soil of another, it was movable property, and as such governed by the law regulating pledges on movables. *State v. Mexican Gulf R. Co.*, 3 Rob. (La.) 513. Under the terms of the act of pledge the creditor was legally put in possession of the thing given as pledge to him, by means of a third person agreed upon between the parties. Rev. Civil Code, arts. 3152, 3162; *Weems v. Delta Moss Co.*, 33 La. Ann. 973. As plaintiff was bound, with others, for the payment of the note, he became, by operation of law, subrogated to all the rights of the original pledges at the moment he paid the note. Rev. Civil Code, art. 3249, § 3.

In this connection, intervenor make the point that plaintiff must be defeated in his claim, based on the act of pledge, because in his answer to the petition of intervention he rested his right thereto on a conventional subrogation executed in his favor by the original pledgee several months after his payment of the note, on the ground that the conventional subrogation which should be made at the time of payment was made too late to be of any avail to him in the premises. It is true that such a subrogation was made, and that it was made too late. It is also true that, in his answer to intervenor, plaintiff disclaims relief thereunder; but this was simply cumulative pleading, and as such not destructive of the allegation in his original petition, wherein he correctly grounded his claim to the pledge by right of legal subrogation, and that is the right which we herein sustain in his favor. These views have led us to the conclusion that the district judge has done substantial justice to the parties in this litigation.

The judgment appealed from is therefore affirmed, at appellant's costs.

TOWN OF PLAINVIEW

v.

WINONA AND ST. PETER R. Co.

(Advance Case, Minnesota. April 28, 1887.)

An agreement entered into between a railway company and the authorities of a town, upon petition of a majority of the tax-payers, in pursuance of the provisions of section 7, c. 107, Laws of Minn., 1877, for the issuance of the bonds of such town, is invalid, and imposes no legal obligation upon the town by reason of the unconstitutionality of the statute; and the latter, in its corporate capacity, is not estopped to resist the enforcement of bonds so issued by the completion of a line of railroad under the agreement by such company.

Where a railroad company procured negotiable bonds to be so issued by the officers of a town, under the section of the statute referred to, which were in form the obligations of the town, and recited on their face that they were issued under such an agreement, and which were accepted by such company, and negotiated and transferred by it for the full face value thereof, and were subsequently negotiated and sold to the citizens of another State, who, in an action in the circuit court of the United States, brought against the town to recover overdue interest, and tried upon the merits, recovered final judgment therefor, which fixed the liability of the town for the whole amount of such bonds to the holders thereof, *held*, that the acts of the company in procuring and negotiating the bonds were without authority of law and wrongful, and that, by reason thereof, a cause of action arose in favor of the town, and against the company, for the recovery of the amount of such bonds, with interest.

Under Sp. Laws 1881, c. 414, upon the purchase by the Winona & St. Peter R. Co. of the property and franchises of the Plainview R. Co., it succeeded to the liabilities of the latter company, including the claim involved in this suit.

APPEAL from district court, Wabasha county.

C. K. Davis, Kellogg & Eaton, and *C. W. Bunn*, for town of Plainview.

Wilson & Bowers for Winona & St. P. R. Co.

VANDEBURGH, J.—The town of Plainview seeks to recover the value of certain bonds, issued by its officers in its behalf, and alleged to have been procured by the Plainview R. Co. FACTS. without authority of law, and thereafter negotiated, and which the town have, in consequence, paid, or are obliged to pay, to the present owners. The case presents some novel features, and involves questions of considerable doubt and difficulty, in the solution of which the court can find but little aid from precedents.

The question of the validity of those bonds was considered and

determined, in the case of *Harrington v. Town of Plainview*, 27 Minn. 228, adversely to the railroad company, and that decision must be accepted without further discussion as the law governing this case. The bonds were not issued upon the vote of the electors of the town, in pursuance of Laws 1877, c. 106, § 5, but in pursuance of section 7 of that act, upon a petition of a majority of the tax-payers. The proceedings to procure such bonds were initiated and prosecuted by the railway company under the act, by filing with the town-clerk its proposition in writing for the issuance to it of the bonds of the town, as provided by section 4, and thereafter in securing and filing the petition of the tax-payers as directed by section 7.

We have no hesitation in saying that the evidence in the case is sufficient to uphold the finding of the trial court, that the bonds in controversy were issued to the Plainview R. Co., and were by its agents transferred to the Chicago & Northwestern R. Co. at their par value, and in consideration of the amount due the latter company, which had been previously advanced by the Chicago Co. in aid of the construction of the Plainview Co.'s road.

Before the issuance of the bonds, the action above referred to was commenced, to enjoin the same, and while the case was pending in this court, the bonds were issued and transferred. The evidence, however, warrant the conclusion that there was any actual fraud in the procurement or transfer of the bonds. Both railway companies were cognizant of the pendency of the action, and of the grounds of the alleged invalidity of the bonds; but the legal questions involved were still open and in dispute, and they were advised and believed them to be legal and valid.

It is affirmed by the trial court, upon sufficient evidence, that, except as appears upon the face of the bonds, Marshall & Ilsey, and others to whom they were subsequently transferred, had no notice of the suit, and were *bona fide* purchasers and holders for value. The Chicago & Northwestern R. Co. was a foreign corporation, and the subsequent purchasers of the bonds were and are citizens of other States. The bonds all recite on their face that they were issued in pursuance of the authority given for that purpose by the laws of the State of Minnesota, and in compliance with a resolution of the board of supervisors of the town, and also "in pursuance of a mutual agreement, which agreement was made in accordance with the laws of Minnesota, and through and by a proposition made by said railroad company, and duly accepted by said town, upon petition therefor signed by a majority of the resident tax-payers, said agreement having been fully performed by said railroad company on its part."

This court held in the *Harrington Case* that an agreement, consummated by proceedings under the provision of the statute referred to, between the railway company and a majority of the tax-

payers, could not, under the constitution, be considered as the lawful agreement of the town, nor be, if any, binding obligation as such, and that bonds issued in pursuance thereof would be void, except in the hands of *bona fide* purchasers.

1. These bonds were invalid in the hands of the Plainview Co., and could not have been enforced by it. It was not material that the company had executed the so-called agreement on its part by building the road. It proceeded on its own motion and at its own peril. There was no agreement made with the town; for it was necessary to secure the consent of the voters, who are the contracting party in its behalf, and the supervisors are simply agents of the town to carry out an agreement duly authorized. *Rochester v. Alfred Bank*, 13 Wis. 432; *Lawson v. Schellen*, 33 Wis. 294. The town, in its corporate capacity, has received nothing and withholds nothing. It has been guilty of no laches, has waived nothing, and there is no estoppel. It represents the public, and is itself entitled to be protected against the unauthorized acts of its own officers, when it can be done without injury to third parties. *Thomas v. Richmond*, 12 Wall. 356; *Town of South Ottawa v. Perkins*, 94 U. S. 261.

VALIDITY OF
BONDS IN HANDS
OF PLAINVIEW
Co.

2. In our opinion, the recitals in the bonds were sufficient to put the purchasers, Marshall & Ilsey, or others, upon inquiry as respects the authority under which such bonds were entitled to be issued, and the manner in which they were in fact issued. As we construe the bonds, therefore, all purchasers are chargeable with notice of the invalidity thereof by the recitals.

3. Marshall & Ilsey, however, brought suit upon the coupons of these bonds as they matured, and recovered thereon in the circuit court of the United States for the district of Minnesota, in a sum less than \$5000, and the bonds have been duly adjudged and determined in a trial upon the merits in that court to be valid in their hands.

For the purposes of this case we are unable to see that it is material for us to inquire into the particular grounds of the decision of that court, as the result of the judgment is, in any event, to make the bonds valid, negotiable securities held by Marshall & Ilsey as *bona fide* purchasers. In other words, it is sufficient to say, that court differs with this court upon the question of the validity of the bonds, and accordingly adjudges the holders entitled to recover thereon, and notwithstanding the recitals therein. The result would be the same if that court had differed with this court on questions of fact resting upon evidence *dehors* the bonds, as to their execution or the *bona fides* of their transfer to the present holders. And the Plainview Co. and defendant not having been parties to that action, this plaintiff is not estopped

EFFECT OF JUDG-
MENT OF U. S.
COURT.

from litigating the questions involved in this case in the State courts. The judgment of the circuit court cannot be reviewed or modified by the State courts; and it is not questioned, as we believe, in this case, that the result of the decision and judgment of the circuit court is to fix, irrevocably, the liability of the town for the whole amount of the indebtedness evidenced by the bonds. *Beloit v. Morgan*, 7 Wall. 619. It must therefore be deemed to have been conclusively settled that the bonds have been transferred to parties, in whose hands they have become valid and legal obligations against the plaintiff town.

On the other hand, it was also conclusively determined that the bonds were void in the hands of the Plainview Co., by the judgment of this court in the Harrington Case.

EFFECT OF THE
JUDGMENT IN
HARRINGTON
CASE.

Upon that question the Plainview Co. had its day in court in the case referred to, and the issuance and disposition of the bonds must be treated by the State courts as unlawful and wrongful; and it is immaterial that the agents of the company entertained mistaken views of their legal rights in the premises. *Comstock v. Hier*, 73 N. Y. 275. If it be conceded that these bonds, when once placed on the market, were liable to pass into the hands of purchasers, who would be entitled to enforce the same as valid negotiable securities in the United States courts, as the result in this case has proved, it must necessarily follow, we think, that plaintiff has a cause of action for damages. Of course, the extent of the injury would depend upon the result of the negotiation of the securities, and in any particular case courts might differ in their determination of the question whether or not the purchasers were *bona fide* holders, upon evidence either *dehors*, or appearing on the face of instruments.

If these bonds had not indicated the provisions of the statute under which they were issued, the plaintiff would have been entitled to an injunction to restrain the negotiation thereof, and if negotiated in the same manner as they have been, and purchased by the same parties, plaintiff's right of action for the face value of the bonds and interest would be unquestioned. *Comstock v. Hier*, *supra*; *Thayer v. Manley*, 73 N. Y. 308. But in their practical results, the case supposed and the case at bar are alike. The Plainview Co. transferred the same for full value in payment for moneys advanced for building the road, and Marshall & Ilsey paid nearly par for them. They were treated by all parties as valuable commercial securities, placed in the market, and sold and enforced as such against the defendant. If the bonds are invalid, and the Plainview Co. acquired no title to them as obligations of the town, upon what principle could it claim to be entitled to the proceeds as its property?

PLAINVIEW COM-
PANY'S RIGHT TO
PROCEEDS OF
BONDS.

In *Comstock v. Hier*, *supra*, the court say: "It would be illogical, conceding the invalidity of the note in the hands of the defendants, and the non-liability of the plaintiff to them, to hold that the defendants would acquire a title to the proceeds of the note by a transfer of the same to a third person. A party cannot fortify his title to property by a sale, as the title to proceeds upon sale will be the same as to the property before sale. I am of opinion that the plaintiff had an election of remedies,—trover for the conversion of the note, or an action for money had and received, for the amount which the defendants realized upon the sale of the note. This follows from the conceded rule that the defendants were without title to the note or authority to dispose of the same." In *Chit. Bills*, *251, the author says: "Where a note or bill was void in its creation, the party entitled to the instrument may maintain an action of *detinue* or trover to recover the same, or its value, or *assumpsit* for money had and received, if the proceeds of the bill had been received." And in *Lamb v. Clark*, 5 Pick. 197, the court say: "There are cases where a party may have an election of remedies, as where there has been a tortious taking of his property, he may bring trespass or trover, or he may waive both, and bring *assumpsit* for the proceeds when it has been converted into money."

In such case the maker is regarded as the party entitled to the note, as against the holder, whose transfer of the same is liable to work an injury to the former, by imposing on him a liability which could not be enforced by the payee, so as to validate that which was before unlawful or unauthorized. And there appears to be no question that, where a person has wrongfully obtained possession of the property of another, and has sold and received the money for it, the real owner may waive the tort, and bring an action for money had and received: he has his election to sue for a conversion, or he may affirm the transaction, and recover of the wrongdoer for the proceeds; in which case the title to the property sold will be confirmed in the purchaser. *Solutio pretii emptionis loco habetur*. *Lamb v. Clark*, 5 Pick. 197; 4 Wait. Act & Def. 472-475, and cases.

In this case, since the Plainview Co. received the full face value of the bonds, the amount of the recovery, if any is had, would be the same in either form of action, and the allegations of the complaint and findings of fact are sufficient to support the action in either form. The title to the bonds has been confirmed in the present holders; and they have recovered, or will recover, the full amount thereof, and the liability of the town has been fixed through the acts of the Plainview Co. in procuring and negotiating the same, which acts this court holds to have been unauthorized and wrongful. Upon what theory, then, can that corporation claim, either that it should be exempted from the consequences of

such acts, or that it is entitled to retain the proceeds of the bonds? They are in form the bonds of the town, and were procured, held, and negotiated as its obligations, and were treated as negotiable securities, and set afloat as such; and that such proceedings should result in their enforcement must be presumed to have been intended and contemplated by the company, either in its own hands, or by purchasers who might occupy a more advantageous position; and it will not now be permitted to object that the bonds are of no value, or allege its own wrong for the purpose of defeating this action. *Comstock v. Hier*, 73 N. Y. 275; *Lamb v. Clark*, *supra*. Had that company brought suit upon the bonds, the whole controversy would have been settled in one action; but the plaintiff is not estopped by the result of the suit of Marshal & Ilsey, to which the Plainview Co. was not a party, and is not, therefore, concluded by the determination in that case.

4. The Winona & St. Peter R. is made defendant, because it has purchased and succeeded to all the rights of the Plainview R. Co. in pursuance of Sp. Laws 1881, c. 414, under which it was authorized to make such purchase, "subject to all demands, claims, and rights of action against said Plainview Co., arising out of the latter company's having heretofore obtained and disposed of certain bonds and coupons, purporting to have been issued by the towns of Plainview and Elgin to said Plainview R. Co.," etc. The purchasing company acquired the property and franchises of the Plainview Co. by virtue of that act, and, of course, took the grant *cum onere*, and subject to the provisions and conditions of the act. *Chicago, St. P., M. & O. R. v. Lundstrum*, 20 N. W. Rep. 199.

We are of the opinion that the plaintiff was entitled to recover, and that the order denying a new trial should be affirmed.

BERRY, J., concurs.

GILFILLAN, C.J., and DICKINSON, J.—We concur in the conclusion expressed in the foregoing opinion; but we would base the responsibility of the Plainview Co. distinctly upon the following considerations: That company, having procured the unauthorized execution and delivery to itself of these bonds, in form expressing the obligation of the town, and having negotiated the same so that they have thus come into the hands of parties who have enforced a recovery upon them, by proper action in a competent tribunal, the corporation is answerable for its own unauthorized acts, which have resulted in this injury to the town, unless this consequence—the recovery upon the bonds—is to be deemed too remote to afford a ground of legal liability. As respects the acts of the Plainview Co., this injurious consequence is not remote, but proximate. The damage suffered by the town consists in its being compelled to pay these

LIABILITY OF
COMPANY PUR-
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PLAINVIEW COM-
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ABLE FOR ITS
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bonds. But that is just what the Plainview Co. must be deemed to have contemplated when it negotiated for, procured, and disposed of the bonds. No other purpose or object can be ascribed to it than that, either in its own hands, or in the hands of future holders, the bonds should be paid by the town voluntarily or by legal compulsion. One charged with responsibility for his own acts, resulting in injury to another, should not be heard to say that the injurious consequence is too remote to subject him to liability, if he actually contemplated that consequence, although others might not have anticipated such a result. That the judgment, by which the liability of the town to pay the bonds has been conclusively established, was erroneous, does not make remote the damage thus resulting to the town, if this result—the enforcement of the bonds—was within the purpose of the company when it procured and negotiated them as the obligations of the town. It is argued that the company could not have anticipated an erroneous decision, and should not be held liable for the consequences of such a decision. Probably it did not anticipate or suppose that an adjudication holding the town obligated to pay the bonds would be *erroneously* made, for it may have supposed the bonds to be valid and rightfully enforceable; but the fact that it did not suppose that such an adjudication would be *erroneous*, does not make remote the damage complained of. It is proximate, and liability follows because the company procured and negotiated these unauthorized securities as the obligations of the town, to be enforced as such, and because they have been so enforced in a court having jurisdiction, as the corporation anticipated they would be.

MITCHELL, J., dissents.

Constitutionality of Acts Authorizing Municipal Subscriptions.—*Amoskeag Nat. Bank v. Ottawa*, 12 Am. & Eng. R. R. Cas. 546; *Thompson v. Perrine*, 12 Ib. 577; *Turner v. Woodson Co.*, 12 Ib. 600; *Shurtleff v. Wiscasset*, 12 Ib. 692; *Tipton Co. v. Rogers, etc., Works*, 1 Ib. 517; *Dodge v. Platte Co.*, 2 Ib. 583; *Smith v. Fond du Lac*, 2 Ib. 641; *Harter v. Kernochan*, 3 Ib. 82; *Jarrolt v. Moberly*, 3 Ib. 113; *Williams v. Louisiana*, 3 Ib. 128; *Durkee v. Board*, 3 Ib. 138; *Welch v. Post*, 5 Ib. 158; *Clay Co. v. Society for Savings*, 5 Ib. 170; *Bank v. Barbour*, 5 Ib. 181; *Moultrie Co. v. Fairfield*, 7 Ib. 194; *Ralls Co. v. Douglass*, 7 Ib. 212; *Winter v. Montgomery*, 7 Ib. 307.

Municipal Subscriptions to Railroad Companies.—Municipal corporations have no authority to issue bonds in aid of a railroad company, or subscribe to its stock, except by express legislative enactment. *Louisville Valley R. Co. v. Fairfield*, 51 Vt. 257; *Pitzman v. Freeburg*, 92 Ill. 111; *Welch v. Post*, 99 Ill. 471; *Delaware Co. v. McClintock*, 51 Md. 325; *Pa. R. Co. v. Philadelphia*, 47 Pa. St. 189; *Jeffries v. Lawrence*, 42 Iowa, 498; *People v. Mitchell*, 35 N. Y. 551; *Cagwin v. Town of Hancock*, 84 N. Y. 532; *Meyer v. Muscatine*, 1 Wall. (U. S.) 384; *Rogers v. Bridgeport*, 3 Wall. (U. S.) 364; *St. Joseph Township v. Rogers*, 16 Wall. (U. S.) 644; *South Ottawa v. Perkins*, 94 U. S. 260; *Wells v. Supervisors*, 102 U. S. 625.

Where the constitution of the State does not expressly prohibit it, the legislature has power to authorize municipal aid to railroads. *Olcott v. Supervisors*, 16 Wall. (U. S.) 678; *Taylor v. Ypsilanti*, 105 U. S. 60; *Amos-*

keag Nat. Bank v. Ottawa, 105 U. S. 267; Bennington v. Park, 50 Vt. 178; Perry v. Keene, 56 N. H. 514; Johnson v. County of Stark, 24 Ill. 75; Quincy, etc., R. Co. v. Morris, 85 Ill. 410; Chicago, etc., R. Co. v. Aurora, 99 Ill. 205; Stevens v. Anson, 73 Me. 489; Lyons v. Chamberlain, 86 N. Y. 578; Williams v. Hall, 65 Md. 129; Armstrong v. Perkins, 43 Pa. St. 400; Stewart v. Polk Co., 30 Iowa, 9; Wapello v. B. & M. R. Co., 44 Iowa, 485.

In *Michigan*, however, it is held that the legislature does not possess this power. *People v. Salem*, 20 Mich. 452; *Bay City v. State Treasurer*, 28 Mich. 499; *Thomas v. Port Hudson*, 27 Mich. 320.

The fact that the State itself is prohibited from subscribing to the stock of a railroad does not prevent the legislature from authorizing a municipality to do so. *Clarke v. Janesville*, 10 Wis. 136; *Robertson v. Rockford*, 21 Ill. 451; *Cass v. Dillon*, 2 Ohio St. 607; *Slack v. Maysville, etc., R. Co.*, 13 B. Mon. (Ky.) 9.

Exercise of the Power.—The power to incur such indebtedness by a municipality must be exercised in strict compliance with the law authorizing it to be contracted. *Harding v. Rock Island, etc., R. Co.*, 65 Ill. 90; *People v. Town of Santa Anna*, 67 Ill. 57; *People v. Jackson Co.*, 92 Ill. 441; *People v. Smith*, 45 N. Y. 772; *Town of Wellsboro v. N. Y. & C. R. Co.*, 76 N. Y. 182; *People v. Hutton*, 18 Hun (N. Y.), 116; *Bowling Green, etc., R. Co. v. Warren County Court*, 10 Bush (Ky.), 711.

Thus, where the statute provides that whether the subscription shall be made or not shall be determined by a vote of the citizens of the municipality at a special election, if the notice of the election be given for a shorter period than that prescribed by the statute, the vote will confer no power. *People v. Jackson County*, 92 Ill. 441. *Compare Sauerhering v. The Iron, etc., R. Co.*, 25 Wis. 447.

In *Town of Wellsboro v. N. Y. & C. R. Co.*, 76 N. Y. 182, the town bonding acts required a petition to the county judge setting forth that the petitioners constitute a majority of the tax-payers of the town appearing on the last preceding assessment-roll, "not including those taxed for dogs or highway tax only." The petition averred that the petitioners were a majority of the tax-payers, and in a separate paragraph followed an averment that their names appear on the last preceding assessment-roll of the town, that they are taxed for or represent a majority of the taxable property of said town on said list, "not including those taxed for dogs or highway taxes only." *Held*, that this was an averment simply that a majority of the taxable property of the town, not including taxes for dogs or highways, was represented by the petitioners, and that the petition, therefore, was invalid. *Andrews, J.*, said: "This court has steadily maintained the doctrine, that the statutes authorizing town bonding in aid of railroads must be strictly pursued, and that the proceedings will not be sustained when there has been a failure to comply strictly with the statutes conferring the authority. These statutes authorize private property to be taken by means of taxation for the benefit of private corporations, exercising, as is held, a *quasi*-public function, and while the courts have been disposed to sustain their validity, and to uphold bonds issued in conformity with the authority conferred, they have refused to go further."

Where the statute authorized a town to subscribe to the capital stock of a railroad, upon a vote taken for that purpose at a regular town-meeting, a vote taken at a *special* meeting called for that purpose will not confer authority upon the town to make such subscription. *Town of Pana v. Lippincott*, 2 Brad. (Ill.) 466.

The taxpayers, in giving their consent to a municipal subscription, may impose certain conditions, the observance of which will be essential to its validity. *People v. Hutton*, 18 Hun (N. Y.), 116; *Falconer v. The B. & J. R. Co.*, 69 N. Y. 491; *Town of Eagle v. Kohn*, 84 Ill. 292.

In *Bowling Green, etc., R. Co. v. Warren County Court*, 10 Bush (Ky.), 711, the county court was authorized to order an election to determine the question of subscription to the railroad. *Held*, that this did not empower the county judge to submit the question of subscription to a vote of the people without having associated with him a majority of the justices of the county.

Where the enabling act requires that a majority, or two thirds, of the legal voters of the county, city, or town shall give their assent to the proposed subscription, a majority, or two thirds, of those actually voting is meant. *Cass County v. Johnston*, 95 U. S. 360; *St. Joseph Township v. Rogers*, 16 Wall. (U. S.) 644; *People v. Town of Harr.*, 67 Ill. 62; *Melvin v. Lisenby*, 72 Ill. 63; *Reiger v. Beaufort*, 70 N. Car. 319; *Hawkins v. Carroll Co.*, 50 Miss. 735.

Where the statute authorizes the electors of a county to subscribe to a certain amount, a subscription voted in excess of the statutory limit is simply void. *Reineman v. The Covington, etc., R. Co.*, 7 Neb. 310.

In *New Haven, etc., R. Co. v. Town of Chatham*, 42 Conn. 465, the town was authorized to guarantee certain railroad bonds, and the voters thereof were directed to pass upon the matter by ballot in town-meeting legally warned. The vote was in fact taken by division of the house and not by ballot, but neither the officers of the town nor any person in its behalf ever claimed or gave notice that it was not taken by ballot until more than three years after, and until long after the railroad company had, in good faith and with the knowledge of the inhabitants of the town, issued the bonds which were to be guaranteed, and delivered them to contractors who had performed work and expended money in reliance upon them. *Held*, that the town as a municipal corporation was estopped from claiming that the vote was not legally taken.

Where the statute requires notice of a town-meeting to be posted in "three of the most public places in the town," if they were duly posted in three public places, the court will not inquire whether the places selected were in fact the most public. *Sauerhering v. The Iron Ridge, etc., R. Co.*, 25 Wis. 447.

It has been held in Illinois that while counties and cities have no right to make bonds, issued in aid of railroads, payable elsewhere than at their treasuries, the fact that a coupon is made payable in New York will not invalidate it; the objectionable words will be regarded as surplusage. *Johnson v. County of Stark*, 24 Ill. 75.

Bona Fide Holders.—After the bonds have been signed, sealed and delivered by the town's constituted authorities to the railroad company, and have passed into the hands of *bona fide* holders for value, the town cannot escape liability by showing that some of the conditions imposed by popular vote have not been complied with by the railroad company. *Insurance Co. v. Bruce*, 105 U. S. 328. See also *Brooklyn v. Ins. Co.*, 99 U. S. 362; *Town of Douglass v. Niantic Savings Bank*, 97 Ill. 228; *First Nat. Bank v. Concord*, 50 Vt. 257. In *Insurance Co. v. Bruce*, 105 U. S. 328, the bonds by their recitals represented, in effect, that they were issued in conformity to law. *Held*, that the town was estopped from asserting, as against a *bona fide* holder for value, the non-performance of conditions imposed by popular vote. Mr. Justice Harlan said: "The statement, on the face of the bonds, . . . fairly imported that nothing remained to be done in order to make the bonds binding obligations upon the town in the hands of *bona fide* purchasers. Under these circumstances the town, by every principle of justice, is estopped, as against a *bona fide* holder, to plead conditions the existence of which was withheld from the public, either to facilitate the negotiation of the bonds in the markets of the country, or because it had full confidence that the railroad company would meet the prescribed conditions." Where,

therefore, the bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further. *Mercer Co. v. Hackett*, 1 Wall. (U. S.) 93; *Miller v. Town of Berlin*, 13 Blatchf. (C. C.) 245; *Clay County v. Society for Savings*, 104 U. S. 579; *Hackett v. Otawa*, 99 U. S. 86; *County of Warren v. Marcy*, 97 U. S. 96; *Sherman Co. v. Simons*, 109 U. S. 735. Compare *Cagwin v. Town of Hancock*, 84 N. Y. 532.

But if there is an entire absence of power to issue the bonds, as distinguished from a defective execution of a power, the recitals therein will afford no protection to *bona fide* holders, who are bound to take notice of the want of authority to issue the bonds. *Lippincott v. Town of Pana*, 92 Ill. 24; *Williams v. Town of Roberts*, 88 Ill. 11; *St. Joseph Township v. Rogers*, 16 Wall. (U. S.) 644; *Sykes v. Columbus*, 55 Miss. 115; *Williams v. Keokuk*, 44 Iowa, 88; *Thompson v. Perrine*, 103 U. S. 806.

See further, as to validity of municipal bonds issued in aid of railroad companies, note to State, etc., *v. C. & L. R. Co.*, 5 Am. & Eng. R. R. Cas. 241.

CHICAGO, ST. LOUIS AND WESTERN R. CO.

v.

GATES.

(*Advance Case, Illinois. March 23, 1887.*)

The only exception to the general rule that in actions at law a plaintiff may dismiss his action at any time before the trial, is that provided by § 31 of the Practice Act, which forbids a dismissal when a plea of set-off has been interposed to an action on a contract; but this section has no bearing in a proceeding for condemnation of land for railroad purposes, although the land-owner has filed a cross-petition to recover for damages to property not actually taken.

A petitioner may dismiss proceedings for the condemnation of land for railroad purposes at any time before rights become vested in the land-owner; the company having the right to abandon one route and select another.

APPEAL from a judgment of the Cook county circuit court rendered against petitioner in condemnation proceedings. Reversed.

The facts are stated in the opinion.

Charles W. Needham and *Louis Munson* for appellant:

J. N. Baker and *R. S. Thompson* for appellee.

CRAIG, J.—This was a proceeding in the county court of Cook county, instituted by the Chicago, St. Louis & Western R. Co.,
FACTS. to condemn certain land for right of way. The petition was filed on the 30th day of September, 1882; and William B.

Gates, with others, was made a defendant to the petition. Among the lands sought to be condemned was a strip 66 feet wide, over and across a part of W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of sec. 35-39-13, in Cook county, lying north of the Illinois & Michigan Canal. This tract was owned by Gates, and he appeared and filed a cross-petition, in which he alleged that the taking of the strip would damage the rest of the rest of the land, and he prayed that such damages might be ascertained. The damages sustained to lands belonging to other parties, embraced in the petition, seem to have been adjusted, and they are not involved in this record; but no action seems to have been had in regard to Gates's land, until May, 1886, when the petition was set down for trial on the 14th day of June, following. On June 14 the trial was postponed until June 29, when it was again postponed until July 6. On the day named, the petitioner appeared and filed a motion in writing, requesting that George H. Ward and Mary A. Ward be made parties to the proceeding. The court denied the motion, and the decision is relied upon as error.

There is no doubt but it is the duty of the court to allow amendments in a proceeding of this character, when amendments may be necessary to bring all the parties before the court who may have an interest in the premises sought to be condemned. But the petitioner did not show that the Wards had any interest in the property, and the proof heard by the court on the question was ample to establish the fact that they had no interest. Under such circumstances, the court very properly refused to delay a trial of the cause to allow disinterested persons to be made parties to the proceeding. Amendments are not made as a matter of course, on the eve of a trial, on the motion of a party. If they were, the trial of a cause might be delayed almost indefinitely. Here the case had been pending several years; and if the Wards had an interest in the property, the petitioner had ample time before the cause was set for trial to ascertain that fact and bring them into court.

When the cause was called for trial, and before a jury was impaneled, the petitioner entered a motion to dismiss the entire proceedings; this motion was overruled by the court, and petitioner excepted. In actions at law the general rule is that a plaintiff may, if he desires, dismiss his action at any time before a trial. We are aware of but one exception to this rule, and that is where a plea of set-off is interposed to an action on a contract. In such a case the Practice Act, § 31, forbids a dismissal by the plaintiff. That section of the statute, however, has no bearing on a case of this character. It appears from the record that after the petition was filed, the petitioner, without the consent of Gates, the owner of the premises, took possession of the property described in the petition, and was in possession at the time the motion to dismiss was made and decided; and it is claimed

ALLOWANCE OF
THE AMEND-
MENT.

RIGHT TO ABAN-
DON THE PRO-
CEEDINGS.

that the railroad company cannot hold possession of the property and refuse to go on with the proceeding to condemn. It is a plain proposition that the railroad company had no right to the possession of the property until the damages for taking had been assessed and paid; and when it went into the possession it was a trespasser, and the owner, Gates, had a right to bring ejectment or trespass, or both, and recover his property and such damages as he may have sustained by the unlawful act of the petitioner. But we are unable to see how the unlawful act of the petitioner would deprive it of the right to dismiss its suit to condemn, if it saw proper to pursue that course. The law affords the land-owner a complete remedy to regain his property at any time he may see proper to invoke its aid.

Importance seems to be attached to the fact that the land-owner had filed a cross-petition to recover damages to property not actually taken. But the cross-petition must fall with the petition. The statute has made no provision that a petition shall not be dismissed where a cross-petition has been filed, and in the absence of a statute we are aware of no authority for establishing a rule of that character. Had the rights of the parties, the petitioner and the land-owner, become fixed by the proceedings which had become instituted, a different question might arise; but such was not the case. The filing of the petition conferred no rights in the land sought to be taken on the railway company, except the one right to proceed and condemn; the taking possession conferred no rights, as that was a mere trespass; nor did the land-owner acquire any vested right in what had been done, which would entitle him to compel petitioner to proceed with the petition and assess the damages, if the petitioner saw proper to dismiss the proceedings.

In *Schreiber v. Chicago & E. R. Co.* 115 Ill. 340; s. c., 23 Am. & Eng. R. R. Cas. 130, we had occasion to consider the relative rights of the parties in a proceeding of this character, and we there held, "Until the compensation awarded the owner of property sought to be appropriated to public use is actually paid, the petitioner has no right to enter upon the premises, and the land-owner has no right to the compensation. Until this is done, the party seeking condemnation may abandon the location and select another. Until paid, the owner may do any act with his property he pleases, not materially affecting the proceeding and object to be accomplished thereby." If the land-owner had no vested right in the proceeding when the motion was made to dismiss, as it seems clear he had not, then it follows that the petitioner had the right, if he saw proper, to abandon the condemnation of the property and dismiss the proceeding.

As the court erred in denying the motion to dismiss, the judgment will be reversed, and the cause remanded.

MAGRUDER, J.—I do not concur in this opinion.

Abandonment of Condemnation Proceedings.—The general doctrine is that there can be no abandonment of condemnation proceedings by a railroad company whenever the rights of the parties have become vested; but as to when the rights of the parties become vested there is a diversity of opinion among the decisions. The doctrine, as ordinarily stated, is that by the confirmation of the report of the commissioners or viewers fixing the amount of compensation, the right of each party becomes fixed and absolute, the one to the property and the other to the money, and the railroad company cannot subsequently abandon the proceedings. *Neal v. The Pittsburg, etc., R. Co.*, 31 Pa. St. 19; *People v. Brooklyn*, 1 Wend. (N. Y.) 318; *In re Washington Park*, 56 N. Y. 145; *In re Rhinebeck, etc., R. Co.*, 67 N. Y. 242; *In re Water Commissioners of Jersey City*, 31 N. J. L. 72; *Drath v. Burlington & Missouri R. Co.*, 15 Neb. 367; s. c., 20 Am. & Eng. R. R. Cas. 385; *North Missouri R. Co. v. Lackland*, 25 Mo. 515; *Pollard v. Moore*, 51 N. H. 188.

In *Drath v. Burlington & Missouri R. Co.*, 15 Neb. 376; s. c., 20 Am. & Eng. R. R. Cas. 385, the defendant caused a certain lot in the city of Lincoln to be condemned for its use, the value of the same being fixed at \$300. The plaintiff appealed to the district court, where a verdict was returned in her favor for \$800, and judgment rendered thereon. *Held*, that the railroad company could not avoid payment of the judgment by abandoning the condemnation proceedings and paying the costs thereof. Maxwell, J., said: "The company must act in good faith. It cannot be permitted to condemn real estate for its use, and after the condemnation is complete, the certificate filed with the county clerk, and the amount of the award deposited with the county judge, an appeal taken to the district court and judgment rendered against it on such appeal, be permitted to abandon the proceedings. The power of eminent domain is placed in its hands to enable it to take such real estate as it may require at its fair value. This, if the case is appealed to the district court, is to be ascertained by the verdict of a jury based upon the evidence. . . . But the court will not permit a railroad company to use the sovereign power of the State—that of eminent domain—as a means to enable it to obtain property at its own price, or failing to do so, refuse to take it."

Rule in New York.—In *New York*, after confirmation of the report of the commissioners of appraisal, the railroad company cannot abandon the proceedings and refuse to pay the award made to the land-owner. The confirmation determines the rights of both parties, subject only to the right of review as to the amount of appraisal. *Matter of Rhinebeck, etc., R. Co.*, 67 N. Y. 242.

In *Cronner v. The Watertown & Rome R. Co.*, 9 How. Pr. (N. Y.) 457, the defendants deposited to plaintiff's credit the amount of an award to him for damages for locating a portion of their route over his land, and recorded the order reciting the proceedings as required by the general railroad act. The plaintiff appealed from this award and secured a second appraisal and an increased compensation, which the company refused to pay on the ground that subsequently to the original appraisal they had so changed their route that the plaintiff's land was no longer necessary for them. *Held*, that the company were liable for the increased compensation.

Contrary Doctrine.—But there is a line of decisions which maintain that the rights of the parties do not become vested until there has been payment or deposit in the manner provided by law of the sum awarded. It is said that the land-owner has no vested right to the compensation awarded until the railroad company has secured a vested right to the property condemned, and *vice versa*. It is accordingly held that until the compensation is paid or deposit made the company has the right to abandon the proceedings. *Denver & New Orleans R. Co. v. Lamborn*, 8 Col. 380; s. c., 23 Am. & Eng.

R. R. Cas. 115; *Williams v. New Orleans, etc., R. Co.*, 60 Miss. 689; s. c., 20 Am. & Eng. R. R. Cas. 378; *Schreiber v. Chicago & Evanston R. Co.*, 115 Ill. 340; s. c., 23 Am. & Eng. R. R. Cas. 120; *Stacey v. Vermont Cent. R. Co.* 27 Vt. 39; *Norris v. Mayor, etc.*, 44 Md. 598; *Graff v. Mayor, etc.*, 10 Ind. 544; *The State, etc., v. The Cincinnati, etc., R. Co.*, 17 Ohio St. 108; *Gear v. The Dubuque, etc. R. Co.*, 20 Iowa, 523.

Rule in Illinois and Iowa.—In *Illinois* it is well settled that until the compensation is paid the company seeking condemnation has the right to abandon the location of the route and adopt another. *St. Louis, etc., R. Co. v. Teters*, 68 Ill. 144; *Chicago & I. R. Co. v. Hopkins*, 90 Ill. 317; *Chicago v. Barbican*, 80 Ill. 482; *South Park Commrs. v. Dunlevy*, 91 Ill. 49; *Schreiber v. Chicago, etc. R. R. Co.*, 115 Ill. 340; s. c., 23 Am. & Eng. R. R. Cas. 130.

In *Blackshire v. Atchison, etc., R. Co.*, 13 Kans. 514, *Brewer, J.*, said: "Until this question of compensation is settled and payment made, the company can abandon the route selected and select another. The fact that it has instituted condemnation proceedings does not compel it to carry them to a close and pay the amount awarded." In *Stacey v. The Vermont Cent. R. Co.*, 27 Vt. 39, the defendants located the route of their road across the plaintiff's land and caused his damages to be appraised and the award of the commissioners to be recorded; and afterwards, before paying or depositing the amount awarded, altered the location of their road and thereby abandoned entirely the route across the plaintiff's land. *Held*, that as there had been no payment or tender of the damages assessed the company had no vested right to the land, and the land-owner had none to the damages and could not recover from the company. See also *The Baltimore, etc., R. Co. v. Nesbit*, 10 Howard (U. S.), 395; *Bloodgood v. Mohawk, etc., R. Co.*, 18 Wend. (N. Y.) 10, 19; *North Missouri R. Co. v. Lackland*, 25 Mo. 515.

In *Iowa* it was held that the judgment assessing the amount of damages passes no title to the company before payment, and does not bind it to accept the lands and pay the amount assessed. *Gear v. The Dubuque R. Co.*, 20 Iowa, 523. In this case the plaintiff, not being satisfied with the damages assessed by the jury for the appropriation of his land by the railroad company, appealed to the district court, where the damages were assessed at \$5500 and judgment entered for plaintiff for that amount. The company afterwards constructed its road on a different line and abandoned its proposed route through plaintiff's land. *Held*, that the judgment against the company did not bind it to accept the lands and pay the amount assessed. Upon final determination of condemnation proceedings in the trial court a review may be had in the supreme court, and the company is not precluded of its right to abandon upon obtaining such review. *Denver, etc., R. Co. v. Lamborn*, 8 Col. 380; s. c., 23 Am. & Eng. R. R. Cas. 115.

Missouri Doctrine as Regulated by Statute.—In *Missouri* the company may abandon the proposed appropriation of any parcel of land by an instrument in writing to that effect, filed with the clerk of the court within 10 days of the return of the commissioners' assessment. See *Gray v. The St. Louis, etc., R. Co.*, 81 Mo. 126; s. c., 22 Am. & Eng. R. R. Cas. 106. See also notes to 23 Am. & Eng. R. R. Cas. 115; and 20 Am. & Eng. R. R. Cas. 384.

Liability for Costs upon Abandonment.—Where the railroad company abandons the proceedings, all the costs and expenses of the land-owner resulting therefrom, including counsel fees, must be paid by the company. *North Missouri R. Co. v. Lackland*, 25 Mo. 515; *North Missouri R. Co. v. Reynal*, 25 Mo. 534; *Rensselaer R. Co. v. Davis*, 55 N. Y. 145; *Williams v. New Orleans, etc., R. Co.*, 60 Miss. 689; s. c., 20 Am. & Eng. R. R. Cas. 378.

Procedure and Practice in Condemnation Proceedings—Statute Requiring a Description of the Lands to be Set Forth in the Petition—What is Sufficient.—The General Statutes of South Carolina, which prescribe the

proceedings necessary for railroad companies to acquire a right of way over the lands of private persons, provide (sec. 1551) that, "if the owner of said lands shall signify his refusal of consent to entry upon his lands without previous compensation, the person or corporation requiring such right of way shall apply by petition, to the judge, . . . in which petition shall be set forth a description of the lands," etc. *Held*, that the statute does not require, for jurisdictional purposes, that the petition shall set forth a *sufficient* or an *exact* description of the lands, and that a description to the effect "that the said company's railway will extend about three fourths of a mile through the lands of said Bennett, and, for the purposes of the company, should be one hundred feet in width," will give the court jurisdiction over the subject-matter. *Ex parte Bennett* (S. Car.), 2 S. East. Rep. 389.

Same—Time Allowed for Appeal under Nebraska Statute.—The 60 days allowed by the Nebraska statute in which to appeal from the award of commissioners in the assessment of damages for land condemned for use of a railroad company are to be computed from the time the board of commissioners file their report to the county court. *Clinton v. Missouri Pac. R. Co.* (U. S. Sup. Ct.), 7 Sup. Ct. Rep. 1268.

Same—Proceedings Necessary to Appeal from Assessment of Damages under Nebraska Statute—Transcript.—Under the Nebraska statute, as it stood prior to the act of March 31, 1887, in order to appeal from the assessment of damages, which the owner of any real estate had sustained by the appropriation of his land to the use of any railroad corporation, it was only necessary to file in the office of the clerk of the district court of the proper county, within 60 days after the filing of the report containing the award of such damages with the county judge, a transcript of the condemnation proceedings, upon which such award of damages was made. A paper headed "Transcript," but consisting of a certified copy only of the report of the commissioners appointed by the county judge to assess the damages, etc., containing their assessment and award of damages, *held* sufficient to give the appellate court jurisdiction of the cause. *Nebraska & C. R. Co. v. Storer* (Neb.), 34 N. W. Rep. 69.

HENRY *et al.*

v.

CENTRALIA AND CHESTER R. Co.

(*Advance Case, Illinois. June 20, 1887.*)

It is not error for the court to compel the parties to proceed to trial in condemnation proceedings before disposing of a plea of *nul tiel* corporation, there being no rule of law or practice allowing any kind of answer to a petition for the condemnation of land in Illinois.

It is not error to admit in evidence, in proceedings to condemn land, certified copies of articles of incorporation of a railroad company, nor to introduce such proof to the jury, where it was sufficient to satisfy the court.

| APPEAL from county court, Washington county.

SCHOLFIELD, J.—This is an appeal from a judgment in a con-
80 A. & E. R. Cas.—18

demnation proceeding. The appellee filed a petition to condemn
FACTS. land for right of way for its railroad, and the land-owner thereupon filed a cross-petition for the assessment of damages to lands not taken for right of way. A verdict was returned by the jury assessing the compensation for land taken, and damages to land not taken, at \$650. The court, after overruling a motion for a new trial, rendered judgment upon this verdict, and the case comes to this court by the appeal of the land-owner. Several grounds are urged for a reversal of the judgment.

1. It is contended that the court erred in compelling appellant
PLEA OF NUL
TIEL CORPORA-
TION. to proceed with the trial before disposing of the plea of *nul tiel* corporation. But since we have held there is no rule of law or practice authorizing the filing of any kind of an answer to a petition for condemnation of land under the eminent domain act (Smith v. Chicago & W. Ind. R. Co., 105 Ill. 511; s. c., 14 Am. & Eng. R. R. Cas. 384), it is impossible that this objection can be well taken.

2. It is next contended that the court erred in admitting im-
ADMISSION OF
ARTICLES OF IN-
CORPORATION AS
EVIDENCE. proper evidence. This refers to certified copies of articles of incorporation of the petitioner, and evidence of user thereunder; and the objection is—*First*, that the articles ought not to have been admitted at all, because there was not also proof accompanying that the full amount of stock provided for had been subscribed; and, *second*, that in no event should the proof have gone to the jury.

The first objection is predicated upon Allman v. Havana R. & E. Co., 88 Ill. 521, in which it was held that, until proof of the whole amount of stock provided for being subscribed, there can be no recovery upon a subscription for stock. That decision is upon the principle that the legal existence of the corporation is the consideration of the subscription, and, therefore, until it is proved, the contract is without consideration, and cannot be enforced. There must, in such cases, not only be proof of a corporation *de facto*, but likewise of a corporation *de jure*. Where the direct effect of the proceeding is to divest title in favor of a party claiming to be a corporation, the same rule also applies. See Hudson v. Green Hill Seminary Corp., 113 Ill. 618.

But this is regarded, not as a proceeding to determine titles, but merely to assess compensation and damages; and, because of the peculiar language of our statute, we have held that it is sufficient in this proceeding to show a corporation *de facto*. Ward v. Minnesota & N. W. R. Co., 119 Ill. 287. The evidence introduced was clearly sufficient for that purpose. It is true this evidence should not have gone to the jury; but, since it was sufficient to satisfy the court of the petitioner's corporate existence, what harm can it have done? We can perceive none.

3. The last objection is that the counsel for the railroad company

was permitted to make improper remarks to the jury, over appellant's objections. The most objectionable remarks are these: "This railroad will benefit the public, and each of us, if built. If you fix these damages too high, the company will not pay them, and the road will not be built. We will never get railroads if they have to pay such damages for right of way." Where the language of counsel tends to excite passion and prejudice to a degree that will probably cloud the judgment, and therefore improperly affect the verdict to be rendered, it should be promptly checked by the court at the time and the counsel rebuked; and for a failure in this regard a verdict in behalf of the party whose counsel thus abuses his position should be set aside; but it is not to be assumed that every misstatement of law or of fact will have the effect of exciting improper prejudices. The instructions of the court, and the good sense of a competent jury, are a sufficient protection against ordinary errors of statement and false arguments of counsel. We find nothing in this record to induce us to believe (the jury having been correctly instructed as to the law) that they were excited by these remarks to act in a way they would not otherwise have acted.

LANGUAGE USED
BY COUNSEL IN
ARGUMENT.

The judgment is affirmed.

NEW ORLEANS AND GULF R. Co.

v.

FRANK.

(*Advance Case, Louisiana. May 23, 1887.*)

When the charter of a railroad company requires that the stock shall be paid for in cash, and that no certificate shall issue until such payment is made, it is a sufficient compliance with the statute prescribing that the charter of such companies must set forth the time when and the manner in which "the stock shall be paid for."

In an expropriation proceeding for a right of way, the verdict of a jury of the vicinage, composed of land-owners, presumed to be familiar with the value of the land sought to be expropriated, will not be disturbed by this court unless it is found to be inconsistent with the proof in the record, or entirely unsupported by evidence.

APPEAL from the Twenty-fourth judicial district court, Plaquemines parish.

E. Howard McCaleb for plaintiff and appellee.

James Wilkinson and *H. C. Cage* for defendant and appellant.

TODD, J.—From a judgment granting the right of way to the plaintiff company through defendant's plantation, and awarding \$200 for the value of same, the defendant has appealed. There was an exception filed to the proceeding to the effect "that the charter of the company does not comply with the law, as it does not set forth the time when and the manner in which the stock shall be paid for." The charter is before us, and it does require that the stock shall be paid for in cash, and that no certificate of stock shall issue until this payment is made. In our view, this is a strict compliance with the statutory requirement. *Baltimore & O. Tel. Co. v. Morgan's La. & T. R.*, 37 La. Ann. 883. The exception was properly overruled. In expropriation proceeding we place great reliance upon the verdict of the jury. Being taken from the vicinage and land-owners themselves, and presumed to be thoroughly acquainted with the character of the land and its value, a court should not disturb the estimate of value fixed by the verdict, unless it is found inconsistent with or entirely unsupported by the evidence.

We have examined the record carefully, and find the usual conflict that characterizes cases of this kind, but this review satisfies us that the verdict was justified by the proof.

Judgment affirmed.

Award of Jury to Assess Damages Generally Not Disturbed.—The report of the commissioners as to the amount of damages is *prima facie* correct. *Crawford v. Valley R. Co.*, 21 Gratt. (Va.) 467. But if the amount awarded is unreasonable, and indicates that it was the result of prejudice or partiality, or that the commissioners must have acted upon a wrong basis of estimating the damages, it is a good cause for setting aside the report. *Chapman v. Graves*, 8 Blatchf. (Ind.) 308. Evidence as to the value of the property condemned and the resulting damages, while admissible, is not controlling; they are the opinions of witnesses simply, and should not ordinarily have greater weight than the official report of the commissioners who have considered all the evidence. *Eastern R. v. Concord, etc., R.*, 47 N. H. 108. See 8 Wood's Ry. Law, 845, n. 2.

CHICAGO, IOWA AND DAKOTA R. Co.

v.

ESTES *et al.*

(*Advance Case, Iowa. June 8, 1887.*)

A committee of citizens, who were desirous of having a railroad run through their town, had an interview with a property-holder with a view of securing a gift of the right of way through her property. She consented to make the

donation provided the company would go north of the barn. The committee subsequently tendered the right of way to the company as they understood it to have been donated by the property-holder—*i.e.*, with a mere preference that the company would run north of her barn. The company ran south of the barn. *Held*, that in the absence of positive proof to that effect the committee were not constituted the agents of the property-holder so as to estop her from proceeding under the Iowa statute for land damages.

APPEAL from circuit court, Hardin county.

This action was brought by the Chicago, Iowa & Dakota R. Co., appellant, for an injunction to restrain the defendants from interfering with the plaintiff's alleged right of way, and also to restrain them from prosecuting proceedings for the assessment of damages under the statute. The court dismissed the plaintiff's petition, and rendered judgment in favor of the defendants for costs. The plaintiff appeals.

John Porter and *Weaver & Baker* for appellant.

M. W. Anderson and *Nagle & Birdsall* for appellees.

ADAMS, C.J.—The defendant, Sarah M. Estes, was the owner of certain land adjacent to the town of Iowa Falls, through which the plaintiff desired to construct its road. Other land-owners in the neighborhood, mostly citizens of Iowa Falls, felt disposed to donate to the company a right of way through their lands. Some of them felt anxious that the defendant, Mrs. Estes, should donate a right of way through her land. Two of the citizens acting for themselves, and claiming to act as a committee of others, visited Mrs. Estes to ascertain what she would do. According to their testimony, she said that she would donate a right of way, but greatly wished that the company would run north of her barn. According to her testimony, she said that she would donate a right of way if the company would run north of her barn. The fact seems to be that the company ran south of her barn. We do not feel called upon to determine what she said. The persons who visited her were neither her agents, nor those of the company. It is not, indeed, we think, claimed that any contract arose at the time they visited her. One of them, however, testified that he afterwards called upon the company, and tendered the ground in question to the company. This, we understand, is relied upon as constituting the contract; but we do not think that it can be so considered. The alleged tender could at most be a mere communication to the company of what had been said by Mrs. Estes. But that was not a communication to the company having the force of an offer, unless the person making the communication was authorized to represent Mrs. Estes in the matter, and there is no evidence that he was. It may be that Mrs. Estes presumed that her words would be communicated to the company. But she had a right to assume that no con-

FACTS.

NO CONTRACT
BETWEEN PROP-
ERTY-HOLDER
AND COMPANY.

tract could arise between her and the company until she sent an agent to the company or the company to her, who had the power to treat in the matter, to the end that her rights might be fully protected, and nothing left to misconstrue as to the location of the road or otherwise. In our opinion, the evidence did not show that the plaintiff acquired the right of way in question.

It is contended by the plaintiff that at the time the court dismissed its petition, and rendered judgment on the merits for the defendants, the action had been withdrawn by the plaintiff. The facts appear to be that the case was tried and submitted and held under advisement from one term to the next. The court then announced the conclusion at which it had arrived, which was adverse to the plaintiff. Thereupon the plaintiff asked leave to withdraw the action without prejudice, which was granted, and an order was entered accordingly. Afterwards the defendants moved to set aside the order, and reinstate the case, and for a decree on the merits. The court overruled the motion, but afterwards, upon the motion being renewed, the court sustained it. All this was done at the same term. No formal notice of the renewal of the defendant's motion appears to have been served upon the plaintiff or its counsel. The plaintiff assigns the action of the court in this respect as error. The court has control of its records during the term, and may, for good cause shown, change an order made during the term. Where a motion to change the record by setting aside an order is made, the party adversely interested should have notice (*Townsend v. Wisner*, 62 Iowa, 672), but when the counsel, as in this case, appear to the motion, and are heard, and no prejudice results from the want of a formal notice, it does not appear to us that such notice is necessary. The case having been fully tried, submitted, and virtually determined, we think that the court should have refused leave to withdraw, and that the court was not in error in sustaining the defendants' motion afterwards for the reinstatement of the case, and the rendition of a decree.

Affirmed.

Conditional Conveyances of Right of Way.—See notes, 8 Am. & Eng. R. R. Cas. 734; 14 Ib. 471; 17 Ib. 44; 20 Ib. 371; 20 Ib. 344; 20 Ib. 347.

Where a release is obtained from the owner of land for the right of way with a proviso calculated to confine the line of such road to a particular portion of the land, the release will not be operative if the company afterwards constructs its road across the land by a substantially different route. *Douglas v. New York & Erie R. Co.*, Clark's Ch. (N. Y.) 174.

Who may take Advantage of a Breach of Condition.—Conditions in such conveyances can only be reserved for the grantor and his heirs, and a conveyance made by the grantor to a third person, either before or after breach of the condition, will not carry with it a right to enter for a condition broken. *Nicoll v. N. Y. & Erie R. Co.*, 12 Barb. (N. Y.) 460; s. c., 12 N. Y. 121; *Underhill v. Saratoga, etc., R. Co.*, 20 Barb. (N. Y.) 455; *Paul v. Connors, ville, etc., R. Co.*, 51 Ind. 527; *Hooper v. Cummings*, 45 Me. 359; *Rice v. Boston & Worcester R. Co.*, 12 Allen (Mass.), 141.

A mere failure to perform such a condition does not divest the title. There must be an entry, or what is made equivalent thereto by statute, by the grantor or his heirs, for a breach of the condition to forfeit the estate. *Nicoll v. N. Y. & Erie R. Co.*, 12 N. Y. 121. In this case the grantor of premises to a railroad company, on condition that it should construct its road thereon within a limited time, afterwards conveyed the same to a third person, and there was subsequently a breach. *Held*, that the latter could not divest the title of the railroad company.

The breach of a condition cannot be taken advantage of by an heir, if he claims by deed. In *Rice v. Boston & Worcester R. Co.*, 12 Allen (Mass.), 141, land was conveyed to the company upon condition that it should maintain and keep in good repair a passway over the same, and also certain fences. The grantor afterwards conveyed to his son a tract of land, including the premises in question, and died intestate before any breach of condition. *Held*, that the grantee, although the son and heir of the grantor, could not take advantage of breach of the condition.

When Formal Entry by Grantor for Breach of Condition is Unnecessary.—In *Taylor v. Cedar Rapids, etc., R Co.*, 25 Iowa, 371, a conveyance of a right of way to a railroad company was made upon the condition that the depot of the company should be located within a certain distance of a particular place. *Held*, that a breach thereof on the part of the company defeated the estate conveyed, and the grantor might enforce the forfeiture and have his damages assessed as though no deed had ever been made; and as the estate conveyed was less than a freehold, and as the grantor had never surrendered possession, no formal act of entry upon the land on his part was necessary in order to take advantage of the breach.

Conditional Conveyance of Right of Way.—What is a Notice to a Purchasing Company.—Plaintiff granted to a railroad company, by oral agreement, a right of way through his land, on condition that the company would construct and maintain a "passway" for cattle and teams under the railroad. This passway was made by the company, and has been used by the plaintiff ever since,—about 20 years. No valid deed of the right of way was ever made by the plaintiff to the railroad company. The railroad afterwards passed into the possession and ownership of the defendant by foreclosure sale. In an action to restrain defendant from destroying the passway, *held*, that its occupancy by the plaintiff was sufficient to charge the defendant, a purchaser under judicial sale, with notice of the plaintiff's rights thereto arising from the agreement, and the defendant cannot claim and occupy the right of way upon any other conditions than those fixed by that agreement. *Swan v. Burlington, C. R. & N. Co. (Iowa)*, 34 N. W. Rep. 457.

In re Petition of MINNEAPOLIS AND ST. LOUIS R. Co., for the
Appointment of Commissioners, etc.,

v.

ST. PAUL, MINNEAPOLIS AND MANITOBA R. Co.

(Advance Case, Minnesota. April 13, 1887.)

It appearing that the Minneapolis & St. Louis R. Co. was constituted and organized as a corporation under the original charter granted to the Minne-

sota Western R. Co, and the acts amendatory thereof, and that its corporate franchises are still being exercised, it is held not to be material in the condemnation proceedings set forth in the record to inquire or determine whether an alleged consolidation agreement, made in pursuance of Special Laws of 1881, c. 113, between such corporation and certain other lines of railway leased or operated by it, is or is not valid, since, in either case, the petition and proceedings are warranted by the provisions of the charter, and a collateral inquiry into the authority of particular officers or directors to manage its affairs will not be made.

The petition in this matter is authorized by chapter 185, Special Laws 1879, which empowers the Minneapolis & St. Louis R. Co. to construct all or any extensions, branches, and spur tracks within the city of Minneapolis, which may be necessary to connect its road with other railroads, and, when necessary for such purpose, to enter upon and cross the road-beds and tracks of other railway companies upon paying just compensation, to be ascertained under the condemnation proceedings thereby authorized. *Held*, upon the evidence produced before the district court, that a case was made out for its consideration, within the provisions of that act, and authorizing the appointment of commissioners as petitioned for.

Under the provisions of section 4 of the same act, the location and manner of crossing are to be determined upon the evidence produced and showing made before the trial court as questions of fact; and in reviewing the decision thereon, this court will only inquire whether there are legal errors in the proceedings, or any abuse of discretion on the part of the trial court.

APPEAL from district court, Hennepin county.

Proceedings by one railroad company to condemn right of way for a crossing over the tracks of another.

J. D. Springer, E. M. Wilson, J. M. Shaw, and John B. Atwater for Minneapolis & St. L. R. Co., respondent.

George B. Young, Charles E. Flandrau, Benton & Roberts, R. B. Galusha, and W. E. Smith for St. Paul, M. & M. R. Co., appellant.

VANDERBURGH, J.—The Minneapolis & St. Louis R. Co., a corporation created and existing under the laws of this State, had, in the year 1881, constructed and then owned, and was operating in pursuance of its charter, a line of railway from the city of Minneapolis to the southern boundary of the State, with its terminus FACTS. on the west side of the Mississippi river, in the city of Minneapolis. It was also at the same time operating, in connection and continuous with its own line, the Minnesota & Iowa Southern R. and the Fort Dodge & Fort Ridgely R., Iowa corporations, whose stock was nearly all owned by the Minneapolis & St. Louis R. Co., and these roads were, to all intents and purposes, used and controlled as a part of its own system, though having separate corporate organizations. The Minneapolis & Duluth R., extending from Minneapolis east to White Bear, and connected with the Minneapolis & St. Louis by a bridge, was also operated, in connection with its own line, by the Minneapolis & St. Louis R. Co., under a lease.

In 1881 the legislature (Sp. Laws 1881, c. 113) amended its charter, and authorized it to acquire, "by purchase or lease, any other railroads in or out of the State whose lines connect with its own, as it now exists, or shall be extended either directly or by means of intervening lines," and also authorized it to merge and consolidate its stock, franchises, and property with those of any other railroad, in the construction of whose lines the Minneapolis & St. Louis Co. shall have aided, or which may be held under lease by it. The same year the legislature also authorized by general law the consolidation of roads, and the purchase and lease thereof, so as to constitute continuous lines, with or without branches. Gen. Laws 1881, c. 94. The Minneapolis & St. Louis R. Co. entered into an agreement of consolidation with the railroads above enumerated, in pursuance of chapter 113, Sp. Laws 1881, above referred to, and such consolidation is alleged in the petition herein.

The court, upon the evidence submitted, finds, generally, that the petitioner, the Minneapolis & St. Louis R. Co., is a corporation for railway purposes, created and existing under the laws of this State, and as such is entitled to exercise the power of eminent domain. This is assigned for error, and the constitutional validity of the special act authorizing the consolidation of the roads, and the consequent right of the petitioner, as representing the new corporation, to institute these condemnation proceedings, are denied. The answer, as originally drawn, did not deny the corporate existence of the petitioner, but merely put in issue its acquisition of the franchises, rights, and properties of the several corporations named, whether by means of the alleged consolidation agreement or otherwise. And the evidence on this branch of the case was all received under the issues so framed. Subsequently, on the coming in of the report of the referee appointed to take the testimony, the answer was allowed to be amended, by substituting a denial of the corporate existence of the petitioning corporation.

1. The abstract question of the validity of the consolidation agreement we do not deem it necessary to determine in this case. It involves matters of grave importance to the corporators or stockholders, but which in no way, as we think, affect the discharge of its duties to the public by the St. Louis Co., or the nature or extent of its business, or the necessity or propriety of the crossing petitioned for. It is not questioned that the proposed crossing and connection are on the original line of the St. Louis Co., as operated before the attempted consolidation; and the provisions of its charter are ample to warrant the petition and proceedings instituted herein. If the consolidation agreement is void because the special act in question is unconstitutional, then the St. Louis Co., whose existence and organization under its original charter, and the acts amendatory thereof, cannot be questioned here, has never been

CONSOLIDATION
AGREEMENT A
COLLATERAL IN-
QUIRY.

merged or ceased to exist, and may be deemed to be the corporation represented in these proceedings. Its franchises continue to be exercised, and this court cannot institute a collateral inquiry as to the rights of stockholders, or whether the present officers and managers have been regularly and legally elected and placed in control of its affairs or not.

The case is fairly before us on the merits. The control or extent of the business of the petitioning company is not affected by the question of the consolidation. This was already fixed by its relation to the other corporations whose roads, under the existing statutes, it operated substantially as owner or lessee. Gen. Laws 1881, c. 31. The consolidation related rather to the stock and organization, than to any change in the nature and extent of the corporate business, or the exercise of the corporate franchises.

We apprehend that, if this petition had contained no reference to the alleged consolidation, it would have been no answer that an abortive attempt had been made to consolidate the other corporations named with the St. Louis Co. under an unconstitutional statute. The variance is not material.

2. The application is authorized by chapter 185, Sp. Laws 1879. Chapter 183 and chapter 184 are substantially similar acts, conferring like powers upon certain other rail-

SPECIAL STATU-
TORY PROVI-
SIONS.

road corporations entering the city of Minneapolis. The act referred to authorizes the Minneapolis & St. Louis Co. to locate, construct, maintain, and operate any and all extensions and branches that may be necessary to connect its road with any and all railroads now built, or hereafter to be built, to or into the city of Minneapolis, and to build and operate extensions, branches, and spur tracks, from any of its lines to any mills, manufactories, or other industries requiring railway facilities in said city. And by the same act the same company is authorized, "whenever or wherever it may be or become necessary to the carrying out of the purposes and exercising the powers granted by this act, to enter upon the tracks and road-beds of any other railroad corporation, for the purpose of effecting a crossing upon, over, or under the same," upon paying just compensation to the corporation injured thereby, to be ascertained as therein provided. And "the district court to which the petition shall be presented shall, at the time of the appointment of commissioners, at the request of either party, and upon such showing as the court shall deem necessary and proper, prescribe the location and manner in which such crossing or connection shall be made, so as to effect the purpose of the petitioning corporation, and at the same time do the least injury to the corporation whose property is taken.

It is obvious that these special acts were passed by the legislature in aid of commerce, and in the public interest, in order to

facilitate intercommunication and transfers between the railroads, and the handling of freight to and from the mills and manufactories in the city, so as to make the transfer of cars and the transshipment of freight convenient, cheap, and expeditious. And there can be no doubt of the power of the legislature to authorize the exercise of the right of eminent domain to condemn rights of way for such purposes. *Clarke v. Blackmar*, 47 N. Y. 150. And we are also clearly of the opinion that a case was made upon the evidence produced before the district court for its consideration, within the provisions of the act in question allowing condemnation proceedings.

The object of the proceedings is to effect a crossing over the appellant's road by the petitioning corporation, so as to connect with the Northern Pacific R., whose yard and tracks lay north and adjacent to the tracks of the Manitoba Co.; the petitioner also having a right of way and a track extending to the proposed place of crossing. Both railroad companies have extensive lines, and transport large amounts of freight. The petitioner has no direct connection, giving it access to saw-mills in the city situated north of the proposed crossing to which the tracks of the Northern Pacific Co. have access, and from which large amounts of manufactured lumber are shipped to distant markets. On the other hand, the Northern Pacific R. Co. has no direct connection, giving it access on the west side of the river to several large flour-mills, which require a large amount of wheat, and which are reached and served exclusively by the tracks of the petitioner. It is insisted by the petitioner, upon the evidence adduced, that the public interest and convenience demand that the proposed direct connection be made for the mutual interchange of traffic between the companies. The transfers are made at present by the Manitoba Co. by switching cars along and across its own line for a fixed compensation or charge per car.

In view of the situation of these lines of road, and the evident purpose of the legislature in passing the act authorizing railway connections and crossings in the city of Minneapolis, we are very clearly of the opinion that this court would not be warranted in reversing the order of the court below directing the appointment of commissioners. The legislature has the power to subject railway companies, under such circumstances, to the burdens imposed by this act. They hold their charters in subordination to the public interest, subject both to the exercise of the power of eminent domain and the police power of the State. And where the facts disclosed are such as to warrant a crossing under the statute, the right to cross is as clear as the right of the original company to acquire the land in the first instance. *Railroad v. Railroad*, 30 Ohio St. 611.

THE DESIRABILITY OF A CROSSING.

NON-INTERFERENCE WITH APPOINTMENT OF COMMISSIONERS.

WHAT IS SHOWN BY EVIDENCE AS TO NECESSITY FOR CROSSING.

The evidence shows that the Northern Pacific R. Co. control and have the right to operate under lease a line of road from Twentieth avenue south, on the west side of the river in Minneapolis, to St. Paul, including a bridge, which road connects on the south with the tracks of the St. Louis Co. running north through the city to the proposed crossing. The Northern Pacific R. Co. can make no connection on the west side of the river with such line to St. Paul save over the St. Louis tracks, its only other connection being between the two cities of St. Paul and Minneapolis on the east side of the river.

It is argued that a crossing ought not to be condemned at the instance of the St. Louis Co. for the benefit of the Northern Pacific R. Co. On the part of the petitioner, the evidence tended to show that the purpose of the petitioner, in seeking to condemn the crossing, was to secure a direct connection with the Northern Pacific Co. for business interchange between the roads coming out from their respective lines, and for business that originates at industries located on their respective tracks inside the city of Minneapolis. It also appears that the connection over its line through the city by the Northern Pacific Co. was contemplated by the Petitioner, and was one of the purposes for which the crossing is sought. And a contract granting such use of its tracks to the Northern Pacific R. Co., for a consideration to be paid to the petitioner, has been entered into between the parties, and was offered in evidence as part of the petitioner's case. It was properly received and considered upon the question of the extent and nature of the business, for the transaction of which the proposed railway connection was demanded. *In re Boston, H. T. & W. R. Co.*, 79 N. Y. 67.

It is to be presumed that such connection will be mutually beneficial to both companies, and that the cars of each will be transferred; and the transportation of the cars of the Northern Pacific Co. on the track of the petitioner, whether to the leased line terminating at Twentieth avenue south to the mills, or other railroad lines, would be fairly within the scope and purposes of these condemnation proceedings, as authorized and contemplated by the statute. Whether such transportation must be affected by the St. Louis Co., or whether it may be done by the Northern Pacific Co., by virtue of a lease or contract entered into under chapter 34, § 69, Gen. St., or otherwise lawfully authorized, we need not determine. The evidence is, in any event, sufficient to support the determination of the district court.

3. We come next to inquire whether there was any legal error or abuse of discretion on the part of that court in prescribing the location and manner of crossing. This matter is to be deter-

mined as a question of fact, upon all the evidence in the case. *California S. R. Co. v. Railroad Co.*, 67 Cal. 62. As in ^{LOCATION AND MANNER OF CROSSING.} such cases the premises are to be used jointly, the statute requires the interests of the parties to be harmonized, so as, on the one hand, to secure, and not defeat, the purposes for which the crossing is sought, and at the same time do the least injury to the corporation whose property is taken. The inquiry upon this branch of the case was exhaustive and thorough on both sides; and, upon the coming in of the referee's report, the judges pursued the investigation still further, and both parties were permitted to introduce evidence at great length before them, to the end that the case might be fairly presented and carefully and justly determined. And we are unable to say, upon a careful examination of the record, that there is not sufficient evidence in the case to justify the order as finally made with the conditions and restrictions annexed.

The order, as we interpret it, permits a permanent crossing by the petitioners over the right of way and tracks of the appellant near the place petitioned for, upon a strip of land 15 feet in width; the location, course, and distances being carefully prescribed by the court on its own judgment, upon the evidence, in order to secure the best practical results. The single-track railway so allowed to be constructed is required by the order to conform to the grade and railway of appellant, "now or hereafter to be established." This provision was, we presume, inserted in view of the evidence on the part of the appellant tending to show the necessity of reducing the grade three or four feet at that point. We think the order preserves all rights necessary to the enjoyment of the premises by appellant, consistent with the use thereof for a crossing by the petitioner. The form of the order is not justly subject to criticism in this respect. It also secures to the Manitoba Co. the preference in respect to the right of way, by providing that its trains should have priority over the trains of the same or inferior class upon the transverse line at the place of junction or intersection. It also requires the preservation of a permanent connection near the First-street bridge, between the tracks of the Northern Pacific Co. and the most northerly track of the appellant, to be maintained by the device known as the "slip-switch," or some other appropriate instrumentality.

The court did not deem it wise or necessary to prescribe further regulations, or require other devices to be employed at the crossing. The details of the management will necessarily be worked out in the natural adjustment of the business relations of the companies in the joint use of the premises, and in the moving of trains in the order required by the court, securing priority to the appellant. The plan adopted, and conditions and restrictions prescribed in the order, are evidently the result of the best judgment of the

trial court, after consideration of the evidence of the witnesses, including that of the experts, and after examining the several plans and schemes proposed by the parties. The appellant's plans included an elevated crossing by a bridge, an under-crossing by means of a cut or tunnel, and a crossing at grade; the latter at a different angle, and at a different point, from that proposed by the petitioner. The plan for an elevated crossing was not insisted on in argument. The evidence in the case also disclosed serious objections to an underground crossing, and tended to show that it would require a cut for a long distance on either side, which would greatly interfere with the handling and transfer of cars and the use of the yard north of the crossing, and would require to be very deep, particularly after the proposed lowering of the tracks of the appellant. And we notice that the engineers of appellant thought so little of this scheme that it was not considered by them, or included in the plans for a proposed crossing devised by them after much consultation, until after the commencement of the trial; and some of them did not hesitate to say that the scheme for an elevated crossing was the best of the two. It must be assumed that any crossing will be more or less injurious to the appellant; hence the commission to ascertain the damages.

As respects the apprehended danger resulting from a grade crossing, we see no reason why the existing arrangements of the Manitoba Co. for the safety of trains at this point may not continue to be successfully maintained. Under these regulations, all east-bound trains are required to come to a full stop west of the First-street bridge, and all west-bound trains are subject to be stopped in a like manner upon signal; and such trains are the more readily stopped on account of the up-grade; and the movements of all trains near this point are governed by signals of warning, where the tracks are preoccupied. These signals are readily and successfully operated by an employee in charge thereof; and we are unable to see why they may not continue to be employed at the same place. And at this point all trains are subject to police regulations as to the rate of speed, and must, it is presumed, necessarily move slowly. Besides, the crossing can only be occupied by the petitioner in subordination to the rights of the Manitoba Co., as prescribed in the order of the court; and it will necessarily be compelled to make regulations in conformity therewith. These signals are now in use to warn approaching trains while transfers are made from the Northern Pacific and Omaha Co.'s tracks in the same locality, to the tracks of different roads, including the St. Louis; and no reasons appear why they may not be equally available in the case of transfers over the proposed crossing.

We discover no errors in the record which would warrant this court in reversing the order of the district court.

Order affirmed.

Crossing Premises of Another Company when Necessity is Shown.—See *Pittsburgh Junction R. Co.'s App.* and note, 28 Am. & Eng. R. R. Cas. 270, and *Chicago, etc., R. Co. v. Joliet, etc., R. Co.* and note, 14 Am. & Eng. R. R. Cas. 76, in the latter of which may be found a full review of the authorities upon the subject.

ILLINOIS CENTRAL R. Co.

v.

CHICAGO, BURLINGTON AND NORTHERN R. Co.

(*Advance Case, Illinois. September 26, 1887.*)

Under the Illinois statutes relating to the crossing, intersection, and junction of different lines of railways and the eminent domain law in general, one railway has no authority to appropriate a portion of the right of way of another company for the purpose of constructing a parallel line.

A federal question, such as entitles the removal of the cause to the United States courts, is not raised by the allegation by the defendant in proceedings by another railway company to condemn a portion of its right of way, that the whole of such right of way is necessary in order to enable it to discharge certain conditions imposed upon it under an act of Congress granting the right of way.

APPEAL from circuit court, Jo Daviess county; WILLIAM BROWN, Jndge.

R. H. McClellan and *John N. Jewett* (*B. F. Ayer*, of counsel) for appellant.

Charles M. Osborn, *M. D. Hathaway*, and *Samuel A. Lynde* for appellee.

MULKEY, J.—By the present proceeding, the Chicago, Burlington & Northern R. Co. seeks to condemn for railroad purposes certain real estate in Jo Daviess county, belonging to the Illinois Central R. Co., the appellant herein. That part of the land sought to be taken which gives rise to the most serious question involved in the present controversy consists of three FACTS. strips of unequal width running longitudinally with and constituting a part of so much of appellant's right of way as lies between the rocky bluffs and the eastern bank of the Mississippi river between Portage Curve and East Dubuque. Appellant derives title to part of this land through the act of Congress of the 20th of September, 1850, popularly known as the Illinois Central Railroad Grant." The part of the right of way thus acquired is 200 feet wide. The remainder of it, having been acquired in pursuance of the statute, is consequently but 100 feet wide. The track

of appellant is laid in the centre of its right of way, and the part of it proposed to be taken by appellee is all that part of the westerly half which lies eight feet or more west of the centre line of the track. This would leave but about two feet between passenger-cars passing each other on the two roads. As the grant from the government to the State just referred to, and through which appellant derives title to a part of the right of way proposed to be taken, was made upon the express condition that the appellant's road and branches "should be and remain a public highway for the use of the United States, free from toll or other charge upon the transportation of any property or troops of the United States," and that the United States mail should at all times be transported thereon under the direction of the post-office department; and as appellant's defence to the proceeding is partly based upon the hypothesis that the whole of its right of way is indispensable to the discharge of the duties which it owes to the government under said grant,—it is contended that the present suit necessarily involves a federal question, which the appellant has the right to have passed upon and determined by the federal courts.

Acting upon this view of the law, the appellant applied to the court below for a transfer of the cause to the circuit court of the United States. This application having been denied, the appellant then filed therein a written motion to dismiss the petition as to each of the parcels of land in question, setting forth the grounds of the motion in numerical order, the fourth of which we think sufficiently covers the question thereby sought to be raised, and is as follows: "(4) Because the plaintiff has located its railroad longitudinally for a long distance, to wit, the distance of ten miles and upwards, within defendant's right of way, and the several parcels of land described in plaintiff's petition form part of said right of way, and are already devoted to public use by respondent, and are necessary to such use, and there is no necessity that plaintiff's said railroad should be located within said right of way." This motion, having also been overruled, was renewed after the evidence was all in, and was again overruled. The jury to whom the cause was submitted, after having been formally charged in respect to the law, returned into court a verdict fixing appellant's compensation and damages at \$40,000, upon which the court rendered final judgment, and the defendant appealed. Numerous questions are presented by the record, which have been ably and exhaustively discussed by counsel on both sides; yet, in the view we have taken of the case, it is not deemed necessary nor indeed proper to consider but two of them: (1) Did the court below err in refusing to transfer the cause to the United States circuit court? (2) Did the court err in refusing to dismiss appellee's petition?

Being of opinion that the second question must be answered in

the affirmative, which will necessarily lead to a reversal of the judgment, it will subserve no good purpose to enter upon a discussion of the other. Suffice it, therefore, to say that, upon the authorities cited in the briefs and for the reasons assigned by appellee's counsel, we are of opinion the court ruled properly in denying the application to transfer the cause to the United States court. In considering the propriety of the ruling of the court in refusing to dismiss the petition either before or after the evidence was in, we do not deem it necessary to enter into an inquiry as to the legal status of appellee for the purpose of determining whether it is such a body as might, under the constitution and laws of the State, condemn property for the construction and maintenance of its projected road. For the purposes of the conclusion reached it may be conceded that it is.

FEDERAL QUESTION NOT RAISED

The only question we shall consider is whether the property sought to be condemned is subject to be taken by appellee for the purposes specified in the petition. That the legislature of the State might, subject to the conditions imposed by the constitution, take the property for the purposes in question, we have no doubt. And we think it equally clear that the legislature might, by a general law manifesting such intention, authorize one railroad company to condemn a part of the right of way of another to the extent and for the uses proposed in this case; but without such legislative authority or enabling act it is manifest the taking of it would be unauthorized. This is conceded. Such being the case, the question resolves itself into this: Is there any existing legislative authority for taking property, circumstanced as this is, for the purposes and in the manner proposed? If such authority exists, it is to be found only in Rev. St. c. 114, §§ 17, 19. Said sections, so far as they have any special bearing upon the present inquiry, are as follows:

WHETHER THE PROPERTY IS SUBJECT TO BE TAKEN FOR PURPOSE SPECIFIED—STATUTORY PROVISIONS.

“Sec. 17. If any such corporation shall be unable to agree with the owner for the purchase of any real estate required for the purposes of its incorporation, or the transportation of its business, or for its depots, station buildings, machine and repair shops, or for right of way or any other lawful purpose connected with or necessary to the building, operating, or running of said road, such corporation may acquire such title in the manner that may be now or hereafter provided for by any law of eminent domain.”

“Sec. 19. Every corporation formed under this act shall, in addition to the powers hereinbefore conferred, have power: First. To cause such examination and survey for its proposed railway to be made as may be necessary to the selection of the most advantageous route; and for such purpose may enter upon the lands or waters of any person or corporation, but subject to responsibility for all damages which shall be occasioned thereby. . . . Fourth.

To lay out its road, not exceeding one hundred feet in width, and to construct the same, and, for the purpose of cuttings and embankments, to take as much more land as may be necessary for the proper construction and security of the railway. . . . Fifth. To construct its railway across, along, or upon any stream of water, water-course, street, highway, plank-road, turnpike, or canal, which the route of such railway shall intersect or touch. . . . Sixth. To cross, intersect, join, and unite its railways with any other railway before constructed, at any point in its route, and upon the grounds of such other railway company, with the necessary turnouts, sidings, and switches, and other conveniences, in furtherance of the objects of its connections; and every corporation whose railway is or shall be hereafter intersected by any new railway shall unite with the corporation owning such new railway in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings or connections, the same shall be ascertained in manner prescribed by law."

The principle is well recognized that a statute should be construed in such a manner that all its parts will not only be consistent with each other, but that every provision thereof shall be given its proper effect, so that nothing in the act will appear to be superfluous or redundant. Should we, in violation of this important principle of construction, attempt to construe or give effect to section 17, above cited, without regard to the provisions of the nineteenth section, we might, by adhering strictly to the letter and closing our eyes to the consequences that would result from such a construction, reach the conclusion that that section is a general grant of power to any railroad company organized under the general law to take, under the eminent domain act, any real estate whatever for the purposes specified in the section, without regard to who owns it or to what uses it is applied.

It will be observed that the only express qualifications or limitations upon the company's right to thus take is its inability to agree with the owner for the purchase of the property, and that the property itself is required or necessary for some of the objects or purposes set forth in the section. Nevertheless the construction here suggested, although within the literal terms of the act, is, as every one will admit, wholly inadmissible, even without reference to the provisions of the nineteenth section. To give it effect according to its literal terms, the entire right of way of every railroad in the State would be subject to be taken by condemnation, like any other real estate. That the legislature could have intended this, or the disastrous consequences that would necessarily result from it, is simply absurd, and consequently such a construction is wholly inadmissible. It is evident that, if the legislature had in-

tended this grant of power to take real estate for railroad purposes should extend to the right of way of existing railway companies, there would have been no occasion whatever for adopting the special provisions contained in the nineteenth section in respect to the crossing and uniting with other railways; and it will hardly do to say that, although the power to take the right of way for the purpose of a crossing, etc., is not given by the seventeenth section, yet that it is given for the purpose of a main track, or for some other specific purpose about which not a word is said in either section.

Viewing the seventeenth section in the light of the provisions of the nineteenth, and applying the general principle of construction adverted to at the outset, we are clearly of opinion that the general grant of power therein given to take real estate for railroad purposes was not intended to extend to property already applied to a public use. This being so, it became necessary, as we have already seen, to provide for the exceptional cases relating to crossings, and the uniting with other roads. If there were other exceptional cases in the legislative mind when providing for crossings, etc., it surely was a very opportune time to name them in that connection. Having failed to do so, we are warranted in concluding, as we do, that the special cases provided for were all which, in the judgment of the legislature, public interest or convenience demanded. Learned counsel for appellee, apparently conscious of the doubtfulness and insecurity of their position, so far as it is rested on the seventeenth section, seek to intrench themselves behind the sixth clause or division of the nineteenth section, which, as we have seen, authorizes any corporation organized under the act "to cross, intersect, join, and unite with any other railroad before constructed, and at any point on its route, upon the ground of such other railroad." Counsel say: "We think that the court will give a meaning to all the words; and we submit that the word 'join' was used advisedly in this statute to authorize and require railroad companies to join in the use of such property as might become necessary to accomplish the purposes of both railroads; and it will be observed that by the latter clause of the paragraph the power is given to determine the amount of compensation under the law of eminent domain, if they cannot agree, so that all the powers, viz., to cross, intersect, join, and unite with such other road, were intended to be compulsory, and, as we think, were intended to cover every contingency which might arise." As we are clearly of opinion the construction here contended for is not the true one, we have given counsel the full benefit of whatever there is in it by setting out in their own words all they have said about it. The terms "join" and "unite," as used above, were clearly intended to authorize merely the bringing together and the forming of a physical union or connection between the tracks of the proposed road and those of the one already

WORDS "JOIN"
AND "UNITE" IN
STATUTE CON-
SIDERED.

built. The transitive verbs "join" and "unite" are used conjunctively, and have for their common object the word "railways," which word they govern in the objective case. Nothing is said about joining in the use of any property, or about co-operating together for any purpose; nor is any expression used from which such an idea can be inferred without doing violence to the language used. The grammatical sense and the popular sense of the language used entirely coincide. Nothing ambiguous or doubtful is perceived in it. But, conceding the construction counsel have placed upon it to be the correct one, it is not perceived how that would strengthen appellee's position, for the object of the condemnation proceeding is not to compel the appellant to "join" in the use of any property. On the contrary, it is to take from appellant and deprive it absolutely of all right whatever in about one half of its right of way for a distance of 11 miles or thereabouts. There is, in our opinion, no warrant or authority in the laws of this State for such an act. As the question turns upon the construction of our own statute, it would therefore be an unprofitable consumption of time to follow counsel in their elaborate discussion of the cases relating to this subject, founded upon constitutions and statutes different from our own, and we must therefore decline to do so.

With respect to the claim that the case is one of peculiar hardship, demanding a departure from the general rule on the subject,

we submit that, conceding the hardship to exist, about which it is unnecessary to express any opinion, it is no part of the duty of courts to provide a remedy in any case, much less in one where the legislature has purposely, as it would seem here, declined to provide one.

We say purposely declined, because it would be unreasonable to suppose that the legislature did not consider the question whether, under special circumstances, it might not sometimes become necessary for one railroad company to take longitudinally the whole or a part of the right of way of another company to be used for its main tracks, and the fact that no provision was made for a case of that kind affords the strongest evidence that the non-action of the legislature was intentional. If the legislature had intended to confer the power claimed by appellee, how easy and natural it would have been to do so by inserting a provision for that purpose in the fifth clause of section 19; but nothing of the kind was done. There, as it has been seen, power is given to the condemning company "to conduct its railway across, along, or upon any stream of water, water-course, street, highway, plank-road, turnpike, or canal," etc. Now if, after the word "canal," it had been added, "or along and upon the right of way of any other railway company, provided the part proposed to be taken is not necessary for the successful operation of the railway of such other company," it would have made the law as appellee now claims it to be; but the legislature

COURTS WILL
NOT PROVIDE A
REMEDY WHERE
LEGISLATURE
HAS DECLINED.

declined to add these words, or any others of similar import, and we must construe the act as it is written. The enumeration of the powers granted by the fifth and sixth clauses of the nineteenth section, according to a familiar rule of construction, is by implication a denial of all other like powers. *Expressio unius, exclusio alterius*. But in addition to this authoritative rule of construction and what has already been said on the subject, we think the sixth clause of the nineteenth section bears upon its face indubitable evidence of the correctness of the construction we have placed upon the act. First, it will be observed that the crossing, intersecting, joining, and uniting therein authorized are limited to a "point" on the route of the proposed road. The expression used would seem to be altogether inappropriate to the taking of a strip of land extending longitudinally a distance of 10 or 11 miles.

The phrase "at any point in its route," used by the legislature in connection with the words "cross, intersect, join, and unite," is not only expressive of the thought that was in the legislative mind, but also of the effect which would necessarily result from either of the acts authorized to be done; for to cross or intersect, or join and unite, to another road, necessarily marks the "point" of such crossing, intersection, or uniting of the two roads. Roads when thus joined and united may merge into a single road, or the two companies may arrange for a joint use of the same track; but in the nature of things there can be no extension of the point of intersection or union, and we emphasize the fact that the power to take the right of way, or of any part of the right of way, of another company is expressly limited to the purposes of crossing, intersecting, and uniting, or, more shortly, to the "connections" of the two roads. This latter expression is more comprehensive than either of the other terms. Indeed, it embraces all three of the cases indicated by the terms "cross," "intersect," and "join and unite." That the term "connections" is used in this sense will be hardly questioned, and the fact that it is thus used affords additional evidence of the correctness of the construction we have given to the statute. Thus, it will be observed the condemning company is authorized to cross, intersect, etc., "upon the grounds of such other railway company, with the necessary turnouts, sidings, . . . and other conveniences, in furtherance of the objects of its connections." Further on it is made the duty of the old company whose road is to be crossed, intersected, etc., to unite with the new company "in forming such intersections and connections." It is then added that if the companies cannot agree upon the amount of compensation to be made for the property, "or the points and manner of crossing or such connections, the same shall be ascertained in manner prescribed by law." All these provisions and expressions considered, the conclusion would seem to be irresistible that the petitioning company has no power under the provisions of the nineteenth sec-

tion to take any part of the right of way of another company, except for the purpose of some connection resulting from a crossing or intersection, or the uniting and joining of the two roads at some point on the line of the new road selected by the petitioning company.'

The judgment of the court below will be reversed, and the cause remanded, with directions to that court to dismiss the petition.

CRAIG and SHOPE, JJ., dissent.

Taking Property and Franchises of Another Company.—This subject is discussed upon the various states of facts in the following cases and notes thereto: Northern Pac. R. Co. v. St. Paul, M. & M. R. Co., 1 Am. & Eng. R. R. Cas. 12; Omnibus R. Co. v. Baldwin, 1 Ib. 316; Lake Shore, etc., R. Co. v. Chicago, etc., R. Co., 2 Ib. 440; *In re* Kings Co. Elevated R. Co. 2 Ib. 437; Lake Shore, etc., R. Co. v. Chicago, etc., R. Co., 2 Ib. 454; St. Louis, etc., R. Co. v. S. & N. W. R. Co., 2 Ib. 487; Penna. R. Co.'s Appeal, 3 Ib. 507; Kinsman St. R. Co. v. Broadway, etc., R. Co., 5 Ib. 327; Lake Shore, etc., R. Co. v. New York, etc., R. Co. 6 Ib. 607; Greenwood v. Union Freight R. Co., 9 Ib. 526; A. & F. R. Co. v. A. & W. R. Co., 10 Ib. 23; *In re* New York, Lake Erie & Western R. Co. 10 Ib. 113; Peoria, etc., R. Co. v. Peoria, etc., R. Co., 10 Ib. 129; B. & O. R. Co. v. P. W. & K. R. Co. 10 Ib. 444; Chicago, etc., R. Co. v. Joliet, etc., R. Co., 14 Ib. 62; Denver, etc., R. Co. v. Denver, etc., R. Co., 14 Ib. 83; Lehigh Valley R. Co. v. Dover, etc., R. Co. 14 Ib. 87; Fitchburg R. Co. v. New Haven & N. R. Co. 14 Ib. 95; State v. Drummond, 17 Ib. 149; East St. L. Conn. R. Co. v. East St. Louis Union R. Co. 17 Ib. 163; Phila., etc., R. Co.'s Appeal, 20 Ib. 1; St. Louis, etc., R. Co. v. Peach Orchard, etc., R. Co. 20 Ib. 251; California So. R. Co. v. Southern Pac. R. Co. 20 Ib. 309; Louisville, etc., R. Co. v. Quinn, 22 Ib. 111; Johnson v. Freeport & M. R. Co., 24 Ib. 266; Sioux City, etc., R. Co. v. Chicago, etc., R. Co., 25 Ib. 150.

Condemnation of Right of Way for Parallel Line.—See Denver & Rio Grande R. Co. v. Denver & South Park R. Co., 14 Am. & Eng. R. R. Cas. 83.

In re Proceedings by the ST. PAUL AND NORTHERN PACIFIC R. Co. to acquire for its Uses a certain Railroad Crossing.

(Advance Case, Minnesota. June 28, 1887.)

Under Gen. St. 1878, c. 34, § 47 (as amended by Gen. Laws 1879, c. 35, § 3), a railway company has no absolute right, at its own mere election, to a crossing over the railroad of another company. The court to whom the application for the appointment of commissioners is made is first to determine whether the crossing sought is necessary and required by public interests.

The provisions of section 17, in that regard, are applicable to proceedings under section 47.

APPEAL from district court, Ramsey county.

D. A. Secombe for St. Paul & N. P. R. Co., petitioner.

R. B. Galusha and C. E. Flandreau (George B. Young, of counsel) for St. Paul & N. P. R. Co., respondent.

MITCHELL, J.—This appeal was taken from an order denying an application of the St. Paul & Northern Pacific R. Co., pursuant to Gen. St. 1878, c. 34, § 47, as amended by Gen. Laws 1879, c. 35, § 3, for the appointment of commissioners to assess and determine the amount of compensation to be made to the St. Paul, Minneapolis & Manitoba R. Co. for a crossing of the railway tracks of the latter company by the railroad of the petitioner at a point in the city of St. Paul about 200 feet southerly of Seventh street.

The only point raised or urged by appellant is that, under the statute cited, it had an absolute right to make the crossing, conditional only upon payment of compensation; that the fact that it elected to make the crossing was conclusive evidence of its necessity; and that the court had on power to consider whether public interest required it, and no discretion except to prescribe the location and manner of making the crossing in case the two companies could not agree. This is a bold claim of absolute power, to which the petitioner, in order to maintain its contention, must show no doubtful right. The power of eminent domain may doubtless be delegated to corporations, to be exercised in such manner and under such restrictions as the legislature may determine; yet it is a prerogative of sovereignty, and its exercise by corporations is a special privilege against common right. Therefore any corporation claiming to exercise it *suo arbitrio*, exempt from any judicial determination as to the necessity or propriety of such exercise, must show a clear and unambiguous grant from the legislature of the right claimed. The foundation idea upon which the right of eminent domain rests is *public necessity*; and, while the legislature is the absolute judge of the existence of such necessity, yet the delegation of the power to any corporation to decide for itself when this necessity exists is so dangerous, and so in conflict with all the previous policy of the State, that it would require very clear language to justify a court in holding that the legislature intended to give one railroad the absolute right, at its mere election, to cross another railroad, although such crossing might not only serve no useful purpose, but also destroy the public usefulness of the road crossed, by jeopardizing the lives of travellers and operatives. Even where special charters make railway companies the judges, in their own cases, as to what property is necessary to be taken for the purposes of their roads, courts of equity have often interfered, at the suit of private persons, to restrain the corporation from an abuse of their power. In this State, in the case of railway companies organized under special charters which gave them very extensive powers to take private property, and which contained no provision for any determination by the court, in the condemnation proceedings, of the question of the necessity of the taking, this court has very clearly intimated that, if they attempted to abuse their powers,

CONTENTIONS OF
COMPANY.

RIGHT OF EMI-
NENT DOMAIN—
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NECESSITY.

the companies would be subject to the control of the courts. *Wilkin v. First Division St. P. & P. R. Co.*, 16 Minn. 271 (Gil. 244); *Weir v. St. Paul, S. & T. F. R. Co.*, 18 Minn. 167 (Gil. 139.)

In 1872, and again in 1879, Gen. St. c. 34, § 17, was so amended as to make the questions whether the public interests required the railroad to be built at all, and whether the lands proposed to be taken were required and necessary, judicial ones to be determined by the court. In view of these considerations, we repeat that it would require unequivocal language to satisfy us that there had been so complete a relaxation of this policy as to leave the matter of making a railway crossing to the uncontrolled will of the corporation desiring to make it. But a consideration of the language of the entire section (47) as amended, and a comparison of it with other legislation *in pari materia*, leads us to the conclusion that no such absolute right is given, but that in proceedings under this section the court has the same powers as in any other case of the proposed exercise of the right of eminent domain under chapter 34, and, as was suggested in *State v. District Court*, 29 N. W. Rep. 60, is first to determine whether the crossing sought is necessary and required by public interest.

The section amended (47) gives to a railroad company power to appropriate so much of any street as may be necessary for the purposes of its road. Gen. St. 1866, c. 34, in which this section is found, contained no express provisions for any determination by the court as to the necessity of the appropriation in any case. And, as the route of the road is left to the company, the same interpretation on which appellant insists would give any railroad company the absolute right to lay its line on any street in any city without control by the court as to its propriety or necessity. Section 47 does not in terms provide how the right granted shall be exercised, except that, if the companies cannot agree upon the compensation, the same shall be ascertained and determined by commissioners to be appointed by the court as herein provided for the appropriation of the property of individuals. The sections referred to are 13 to 17 of chapter 34; the latter section being amended by section 1 of the same chapter (35), Laws 1879, on which appellant founds its claim.

Under these sections the court is only authorized to appoint commissioners when (1) a petition has been presented in conformity with section 14; (2) notice has been given as required by section 15; (3) a hearing has been had at which all persons interested may show cause, etc.; (4) the court has been satisfied that the public interest requires the prosecution of the enterprise, and that the property sought to be taken is required and necessary to such enterprise as provided in section 17. And by section 13 the power of condemnation, and the procedure in the exercise of it, are expressly

limited to necessary lands. In making the provisions of these sections applicable to proceedings for a crossing, we think the legislature intended to include the whole of them, including that requiring the court first to be satisfied that the public interests require the prosecution of the enterprise, and that the lands proposed to be taken are required and necessary for that purpose; in other words, that the authority to appoint commissioners in an application for a crossing under section 47 is only found in section 17, and is coupled with all the conditions precedent to its exercise prescribed by the latter section.

As was suggested in *State v. District Court, supra*, the provisions of Laws 1879, c. 80, give much force to this view. This act was passed only four days before the act (chapter 35) SAME CONSTRUCTION. now under consideration. Both relate to the same general subject-matter,—railway crossings. Chapter 35 provides for crossings by railroads organized under Gen. St. c. 34; chapter 80 for crossings by any and all railroads. The latter act puts the right to such a crossing on the same footing as the right to take any other property, and hence requires the court to be satisfied that the crossing is necessary, and is required by public interests. It would certainly be remarkable that the legislative policy in regard to the right to acquire these crossings should have undergone so radical a change in so short a space of time. Neither can any good reason be assigned why an absolute right should be given to companies organized under the general law, and only a qualified right given to those organized under special charters. As suggested by respondent, if any distinction was to be made, it would seem more natural that it would be in favor of companies organized under special charters whose lines the legislature itself had declared to be required by public interests, rather than in favor of those companies whose enterprises are determined by themselves alone.

An argument made by the petitioner in favor of its construction is that this section is copied from the general railroad law of New York (Laws 1850, c. 140, § 28), and that, NEW YORK STATUTE AND CONSTRUCTION COMPARED. before it was adopted here, it had been construed in New York in accordance with petitioner's claim (*In re Buffalo & L. R. Co.*, 15 Hun, 365, and 77 N. Y. 557). It will be observed, however, (1) that while section 3 of chapter 35 is based on section 28 of the New York statute, it so far differs from it as to show that our legislature did not intend to adopt the latter section bodily; and (2) that the law had not received any authoritative construction by the court of appeals in New York until after the enactment of section 3 in this State. It will also be observed that our legislature did not adopt the entire statute of New York, but merely took a part of a single section out of the general railroad law of that State, and incorporated it, with certain modifications,

into the body of our general railroad law, which is a materially different system. Now it is a familiar rule of statutory construction that, in construing any part of a law, the whole must be considered. The different parts reflect light on each other. Hence although, when an entire statute is adopted, the settled construction of it by the highest court of the State may be presumed to be also adopted, this presumption does not necessarily obtain where but a single section is taken from the body of a system of laws on a certain subject, and inserted into another and essentially different system of laws on the same general subject, for the manifest reason that in the latter connection its meaning may be so far modified or limited by other portions of the statute as to be very different from what it bore in the law from which it was borrowed.

This is well illustrated in the present case. The general railroad law of New York gave no such absolute right to a crossing as is here claimed by the petitioner. By section 22 of that law, before building into any county, the company must file a map and profile of its intended route, and give notice to all occupants of land over which the proposed route passes. Any party feeling aggrieved by the proposed location may apply to a supreme court justice, setting forth his objections, who, after hearing the parties, may affirm or alter the same, as may be "consistent with the rights of all parties and the public." Hence petitioner's claim of an absolute right to cross the line of another road at its own mere election, regardless of public interests, and independently of the control of the courts, receives no aid from the statutes of New York. Section 22 of the statute of that State gives the courts a control over the route of a railway analogous, in the main, to that given to them by section 17 of our statute; and we think that in borrowing the substance of section 28 of that statute, and inserting it in section 47 of ours, the legislature intended that the right of a railway company to a crossing should be subject to the control and discretion vested in the courts by section 17.

BERRY, J., owing to illness, took no part in the decision of this case.

Crossing Premises of Another Company—When Necessity is Shown.—See *Pittsburg Junction R. Co.'s Appeal*, and note, 28 *Am. & Eng. R. R. Cas.* 266–270; and the note to 14 *Am. & Eng. R. R. Cas.* 76. See also the preceding case.

ROBINSON

v.

MISSISQUOI R. Co. *et al.**(Advance Case, Vermont. September 7, 1887.)*

The appending of the words "for the use of a plank road" to the description of the land in the granting part of a deed constitutes a limitation upon the grant; and the deed conveys but an easement.

The contract under which land was taken by a railroad company clearly evinced an intention and purpose on the part of the owner to hold the title until the damages were paid. *Held*, that the owner is in equity in the position of one who has contracted to sell land on certain conditions being performed, and his right in equity to recover damages or possession is not barred by the statute of limitations until 15 years have elapsed.

Where the finding of the master as to the time when the sum found due commences to draw interest is equivocal, no more can be allowed than is asked for by the bill, nor will the orator be allowed to amend.

APPEAL from chancery, Franklin county.

Bill in equity. Heard on bill, answer, replication, and report of special master at September term, Franklin county, 1886; TAFT, Chancellor. Bill *pro forma* dismissed. Appeal by orator.

The bill was brought to recover land damages, and, in default of payment, for foreclosure. The master found that on February 26, 1858, the orator was the owner of a farm in Swanton, and on that day conveyed by deed a strip of land through said farm to the St. Albans & Richford Plank-road Co. The description in said deed of the premises conveyed was as follows: "Being a strip of land four rods in width across my land, and being the same land now occupied by the St. Albans & Richford Plank-road Co. for their road," and to the description was added the clause, "for the use of a plank-road;" that about February 26, 1858, said plank-road company constructed their road through the orator's farm, and took for that purpose the strip of land above described; that said company occupied said land until about July, 1870, when it was conveyed to the defendant railroad company, and upon which the railroad was afterwards constructed. In November, 1870, the railroad company was mortgaged to W. C. Smith, B. P. Cheney, and William Stevens, trustees, who went into possession claiming title under said mortgage. It appeared that the orator objected to the construction of the railroad, claiming that the grant of said strip of land had been for the use of a plank-road only. In August, 1876, a committee appointed for the appraisal of land

damages, and authorized to act for the railroad company, agreed with the orator upon the amount of damages sustained by him on account of the construction of said railroad, which was \$300; but the trustees were not parties to the agreement, which was as follows:

ST. ALBANS, August 29, 1876.

John W. Newton, Treasurer—Dear Sir: We have this day agreed with Israel Robinson, of Swanton, to allow him \$300 for damages by reason of the location of our road upon the line of the plank-road through his farm, which sum you are hereby authorized to pay.

SILAS P. CARPENTER,

E. A. SMITH,

Committee on Land Damages.

The master also found as to interest: "And the parties before me agreed that the actual damages to said farm, and to said Robinson by reason of constructing said railroad over said strip of land, was \$300, and that if said trustees were required to pay said damages, or the agreed damages, they should pay interest from the time that said railroad company would be legally bound to pay interest. If the orator is entitled to interest from the time said M. R. Co. took the exclusive possession of said strip of land, and commenced operating their railroad over said land, then I find said interest to September 20, 1886, to be \$270, making the interest and damages to that date \$570. If the orator is entitled to interest on the damages only from the time the damages were agreed upon as aforesaid, then I find said interest to September 20, 1886, to be \$181.50, making the interest and damages at that date \$481.50."

P. M. Buck & Son for orator.

Noble & Smith for defendants.

Ross, J.—1. The first contention is whether the deed from the orator of February 26, 1858, to the St. Albans & Richford Plank-road Co., conveys the fee or an easement in the premises described. The language used in the granting part of the deed and in the *habendum* is appropriate, and that commonly used to convey the fee. The first part of the description of the premises, "being a strip of land four rods in width across my land, and being the same land now occupied by the St. Albans & Richford Plank-road Co. for their road," is appropriate to an absolute grant. But the remaining clause, "for the use of a plank-road," unless properly descriptive of the premises, is such language as would naturally be used to limit or qualify the grant,—to change it from a fee to an easement. The description of the premises granted is complete without this clause. This clause, in the original deed is separated from the former part of the description by a mark of some kind, designed, evidently, either for a comma or a dash. This clause can have no force as descriptive of the premises conveyed, and no force at all unless as qualifying and limiting the

ONLY AN EASE-
MENT CONVEYED
BY DEED.

grant. It is an important rule of construction, applicable to all written instruments, that every word and every clause shall, so far as possible, be given some force and meaning; and that in case construing the whole instrument one way meaning is given to every word and clause, while construing it another way some portion of the language used is rendered meaningless, the construction which gives force and meaning to all the language used is, as a rule, to prevail. This is upon the presumption that the party making the instrument did not use any language except what was necessary to make it speak the intention of the parties thereto. Again, when it is doubtful what the construction should be, resort to the circumstances surrounding the transaction may be had to enable the reader to understand and apply the language used. The language of the deed indicates that the grantee was already in the occupation of the premises granted. The only possible use to which the grantee could put the premises was for its plank-road; hence it would desire to purchase the right to so use it only. It was also natural that the grantor should desire to limit the grant, it being a strip of land four rods wide through his entire farm. The consideration of the deed, \$40, is quite inadequate for an absolute grant of three acres so situated as to sever the orator's farm. Under these circumstances, we should naturally expect to find an easement rather than a fee granted. When language is found in the instrument making the grant, fitted to create the grant naturally to be desired by both parties, although not in the usual form of such a grant, it should be given its evidently intended force and effect. *Keeler v. Wood*, 30 Vt. 243. In making the conveyance, a common printed blank deed was used. It was easier to write the limiting clause in the blank space left to be filled with the description of premises, and at the close of such description, than to erase and insert it in the *habendum*. We think this clause was intended as a limitation upon the grant, reducing it from the grant of the fee to an grant of an easement for the use of a plank-road, all that the grantee cared to acquire, and all that the grantor would be likely to desire to part with.

2. If the St. Albans and Richford Plank-road Co. only took an easement in the premises, it is not contended, under the recent decisions (*Kendall v. Railroad Co.*, 55 Vt. 438; *Kittell v. Railroad Co.*, 56 Vt. 96; *Adams v. Railroad Co.*, 57 Vt. 240), on the facts found by the master, that the orator is not entitled to recover, unless he is barred by the statute of limitations, which is insisted upon. This suit was brought to the April term of the court of chancery of Franklin county, 1885. The railroad company entered upon the land in 1870, but acknowledged its obligation to pay the orator's damages by an order on the treasurer therefor, Aug. 29, 1876. The trustees under the mortgage took possession in November, 1877.

OWNER'S RIGHT
TO DAMAGES NOT
BARRED BY THE
STATUTE OF LIM-
ITATIONS.

If this were an action at law to collect the damages thus agreed upon, it would be barred by the statute of limitations. While it is a suit in equity for the collection of those damages, it is also more than that, as it seeks to recover the premises, if the damages are not paid within the time limited for that purpose. The result of the recent decisions of this court in this class of actions, as I understand them, though it has not been so expressly stated, is that where, from all the facts and circumstances, it is evident the landowner intends to hold the title of the land taken until his damages are paid, the law will treat him as it does any owner of real estate who by contract allows another to take possession of the premises contracted to be sold, and to make improvements or payments, who is not to have a conveyance of the title until the entire or specified portion of the purchase-money is paid, as holding the title as security for the payment of the damages ascertained or to be ascertained, or the contract price. While, strictly speaking, the relation of mortgagor and mortgagee does not exist between parties so related to real estate, yet in equity they are treated very much as though that relation did exist between them. The time stipulated for payment or other performance is rarely in equity considered the essence of such contracts. If the purchaser by contract is ready and willing to perform, though after the time stipulated, he is allowed in equity to do so, and the contractor is decreed to convey upon such tendered performance. This is the rule in equity, unless the case is exceptional, and the contractor will be placed at a disadvantage by the allowance of a subsequent performance. The contractor, until the time for performance has expired, holds the title to the premises in trust for the purchaser by contract, and also as security for performance by the contract purchaser. Where the purchaser in possession has not fulfilled, the contractor may maintain ejectment for the recovery of the premises contracted to be sold. But if the purchaser in possession has partly performed, though not in time, he may in equity be allowed to perform and receive conveyance, and have the suit in ejectment perpetually enjoined. Inasmuch as the purchaser in possession may almost always, if not always, thus force the contractor into equity, the contractor may first bring his suit in equity, and have the rights of the purchaser in possession in the premises foreclosed, if he refuses and fails to perform in such extended time as the court of equity may allow. The relation of a land-owner whose land is taken by a railroad company for the use of its railroad, with or without the exercise of the power of eminent domain, who either consents that the railroad company may take possession, or forbids it, if he clearly evinces an intention and purpose to hold the title until his damages are paid, while from the nature of the possession and the interests involved he may not maintain ejectment, is, in equity, that of the owner of real estate who has contracted to sell

it on certain conditions being performed or payments made, and has allowed the purchaser to take possession. He may, like such owner, enforce the performance by a time limited in equity or recover possession of the premises contracted to be sold. I think all the recent cases on this subject fall within this familiar principle in equity. By the suit in equity the land-owner says, in substance: "I still hold the title of the premises taken. I never intended the railroad company should have it until it paid me my damages. It has not paid the damages, either because it never agreed to, or agreed to and has not performed its agreement. I ask that it shall pay or surrender to me the possession of the premises." It is thus seen that the suit in equity is really for the recovery of the possession of land, and is not barred by the statute of limitations, if at all, in equity, until fifteen years have elapsed. While the statute of limitations is not strictly applicable to suits in equity, courts of equity recognize the time limited by such statutes as the time when a party should be at rest from the embarrassments and perplexities of litigation. No such facts exist, nor such time has elapsed as would lead a court of equity to refuse the orator relief in this case.

3. The only further contention is in regard to the time when the interest is to commence. The finding of the master, as to the agreement in regard to the damages, is equivocal as to the time when the sum found is to commence to draw interest. It is that the orator is entitled to interest on TIME WHEN INTEREST COMMENCED. the sum found as damages from the time the railroad company would be legally bound to pay it. If there had been no agreement in regard to the damages, that would be from the time it took possession. But it is found that by the agreement with the railroad company interest would commence on the \$300, August 29, 1876. This is all the orator has claimed by his bill. He must be held to the demands of the bill; nor should he be allowed to amend it in this respect, on the equivocal finding of the master on this subject.

The decree of the court of chancery is reversed, and the cause remanded, with a mandate to enter a decree that unless the defendants pay to the clerk \$481.50, with interest since September 20, 1886, and costs of suit, for the orator, by a time to be limited by the court of chancery, the defendants shall be perpetually enjoined from using the premises described in the bill; and upon such payment, if made, the orator is to deliver to said clerk a deed of said premises for the use of a railroad, to the defendants before receiving the money.

Title Acquired by Railway under Conveyance of Right of Way by Land-owner.—Where a land-owner has granted a right of way to a railroad company organized under a charter in perpetuity, and the grant contains no limit as to the time, the easement will be perpetual, unless terminated by release or

abandonment. *Junction R. Co. v. Ruggles*, 7 Ohio St. 1. But if the conveyance is restricted as to the time it is used for railway purposes, the title reverts to the grantor when it ceases to be used for that purpose. *State v. Brown*, 27 N. J. L. 13.

In *Hill v. Western Vt. R. Co.*, 32 Vt. 68, the company, before the road was laid out or surveyed, procured a bond from B, to sell them such lands owned by him as should be required for their road. Their charter provided that the directors might cause such surveys of the road to be made as they deemed necessary, and fix the line of the same, and that the company might enter upon and take possession of such lands as were necessary for the construction of their road, and requisite accommodations. The survey of the road, made by order of the directors, designated certain land belonging to B as depot grounds; and the company paid him for and took the same, but never received any conveyance thereof from him. The plaintiff having recovered a judgment against the company, levied his execution upon a portion of this land, and brought ejectment against the company to recover possession thereof. The referee to whom the case was referred found that a part of the land embraced in the levy was never necessary to the company for railway purposes, and would not become so prospectively. It was held that by B's contract with the company he was not bound to convey to them any greater quantity of, or estate in, his land than they required for depot accommodations; that under their charter the company could not acquire any more land, or any greater estate therein, for the purposes of a roadbed or stations than was really requisite for such uses; that the estate so requisite was not one in fee simple, but merely an easement, and was, therefore, not subject to be levied upon by the creditors of the company; that when taken for such purposes the rule was the same, whether the land was taken compulsorily by condemnation, and the award of commissioners as to its extent and price, or under the agreement of the parties as to one or both of these particulars; that under their charter the directors had power to lay out their road and stations as they saw fit; and that, so long as they acted in good faith and not recklessly, their decision as to the quantity of land required for depot accommodations would be regarded as conclusive. Cited in 2 Wood's Ry. Law, 778.

CAMPBELL

v.

INDIANAPOLIS AND VINCENNES R. Co.

(*Advance Case, Indiana. April 26, 1887.*)

Where a license has been granted by a land-owner to a railroad company, incorporated under the general laws of the State of Indiana, to enter and take possession of a strip of land for the construction of its road, and the company has entered and expended large sums of money in the construction and maintenance of its road thereon, a person claiming title from such licensor, with notice, will be estopped from revoking such license.

The occupancy and use of the strip of land for a roadbed and railroad

track, and the running of trains, is sufficient notice to one claiming under such licensor.

Section 3903, Rev. St. Ind., 1881, gives every railroad company organized thereunder the power "to lay out its road, not exceeding six rods wide," etc.; and where a railroad company enters upon land with leave and license of the owner, and constructs and runs its road on the faith of such license, it will be presumed, as against one claiming under the licensor, in the absence of any limitation to the contrary, that the right of way thus acquired extended to the full statutory width of six rods.

APPEAL by the plaintiff from a judgment of the Marion superior court in favor of the defendant in an action of ejectment.

Affirmed.

The facts are stated in the opinion.

John C. Brush and *Adams & Newby* for appellant.

Samuel O. Pickens, *W. A. Harrison*, and *W. E. McCord* for appellee.

Howk, J.—This suit was commenced by appellant, Campbell, against appellee, in the Morgan circuit court, on the 19th day of November, 1883. The object of the suit, as stated in FACTS. appellant's complaint, was to recover the possession of a strip of land 100 feet wide and 1708 feet long, particularly described, in Morgan county, occupied and used as by appellee for its roadbed and right of way for fourteen years then last past; whereof it was alleged that appellant was the owner in fee simple, and entitled to the possession; and that appellee had wrongfully taken and unlawfully held the possession thereof, for the period aforesaid, to appellant's damage, etc.

Appellee answered by a general denial of the complaint; and also filed a counterclaim or cross-complaint wherein it stated its title to and claim upon the strip of land described in the complaint, and alleged that appellant's demand therefor was a cloud upon its title, and prayed that the same might be quieted. Issue was joined on such counterclaim or cross-complaint, by answer in general denial. On appellant's application, the venue of the action was changed to the court below. There the issues joined were tried at special term, and a finding was made against appellant on his complaint, and in favor of appellee on its counterclaim or cross-complaint; and, over his motion for a new trial, the court adjudged and decreed that appellant take nothing by his suit herein, and that appellee's title to the strip of land in controversy be quieted, etc. On appeal, the general term affirmed the judgment and decree of the court at special term.

A number of errors were assigned by appellant in general term, all of which are properly presented here.

His counsel, however, have confined their able and exhaustive argument to the discussion of a single question; namely, the

alleged insufficiency of the evidence to sustain the finding and judgment of the court at special term. It was shown by the evidence that appellee's roadbed and railroad track were constructed on and over the strip of land in controversy, during the years 1867 and 1868. At that time Joseph Campbell, the father of appellant, and under whom he claimed title, was the owner of, and resided upon, the real estate through which such strip of land extended, and continued to reside thereon long after appellee's road was constructed and operated, and within a short distance thereof, until he died in 1881. It is claimed by and on behalf of appellee that it entered upon and took possession of the strip of land in controversy for its right of way, with the leave and license of said Joseph Campbell, and had expended large sums of money, to wit, etc., in the construction and maintenance of its roadbed and railroad track on, over, and along such strip of land, in pursuance and upon the faith of such license, and in the actual presence, and with the knowledge and consent, of the said Joseph Campbell; and had owned and operated its line of railroad thereon continuously, from 1868 until the death of Joseph Campbell in July, 1881, without any objection thereto on his part.

If there be evidence in the record of this cause, which fairly tends to sustain the appellee's claim as we have stated it,—as we think there is such evidence,—it is settled, by our de-

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cisions, that the appellant, who claims title under said Joseph Campbell, cannot recover herein. *Snowden v. Wilas*, 19 Ind. 10; *Lane v. Miller*, 27 Ind. 534; *Hodgson v. Jeffries*, 52 Ind. 334; *Ogle v. Dill*, 55 Ind. 130; *Buchanan v. Logansport, C. & S. W. R. Co.*, 71 Ind. 265; *Nowlin v. Whipple*, 79 Ind. 481; *Simons v. Morehouse*, 88 Ind. 391.

In the cases cited, the doctrine is declared and acted upon, which has been recognized and approved by the courts of last resort in many of our sister States, that, where a parol license has been given, upon the faith of which moneys have been expended, the licensor and those claiming under him, with notice, will be estopped from revoking such license where the licensee cannot be placed *in statu quo*. Where the license is revocable, it may be determined at once, without notice, by a conveyance from the licensor; but where, as here, the license is not revocable, the grantee who takes with notice, as well as the original licensor, is bound by the equitable estoppel. In the case in hand, the occupancy and use of the strip of land in controversy for appellee's roadbed and railroad track, and for the running of its trains, was sufficient notice to appellant, who claims under the original licensor of appellant's equity. For "that which shall be sufficient to put the party upon inquiry is notice." *Hiern v. Mill*, 13 Ves. 120; *Martins v. Jolliffe*, 1 Amb. 314; *Singer v. Scheible*, 8 West. Rep. 404.

It may be assumed—the contrary not appearing—that appellee was and is incorporated under the general law of this State providing for the incorporation of railroad companies, approved May 11, 1852, and in force since May 6, 1853. In the fourth clause of § 13 of such general law (Rev. Stat. 1881, § 3903), the general power is conferred upon such corporations as the appellee “to lay out its road, not exceeding six rods wide, and to construct the same.” When, therefore, it appeared that the appellee, with the leave and license of Joseph Campbell, under whom appellant claims title, had entered upon and taken possession of the strip of land described in the complaint herein, and upon the faith of such license had expended large sums of money in the construction and maintenance of its line of railroad thereon, it was properly held, we think, that appellee’s right of way thus acquired, in the absence of any limitation thereon appearing to the contrary, extended to the full statutory width of six rods, or 100 feet. *Prather v. Western Union Tel. Co.*, 89 Ind. 501, and authorities cited.

The controlling question in the case under consideration is one of fact and not of law, and may be thus stated: Did the appellee enter upon and take possession of the strip of land described in the complaint herein with the leave and license of Joseph Campbell, the then owner thereof,—and under whom appellant claims title,—and expend its money, upon the faith of such license, in the construction and maintenance thereon of its line of railroad? Upon conflicting evidence this question was decided in the affirmative by the finding of the trial court against the appellant, and in appellee’s favor; and this finding, and the judgment and decree of the court thereon, were, in all things, approved and affirmed by the general term. As we have already said, there is evidence in the record of this cause which fairly tends, we think, to sustain the finding and judgment below on every material point. In such a case it is settled by our decisions that the finding of the trial court will not be disturbed here, nor the judgment below be reversed upon what might seem to be the preponderance of the evidence. *Rudolph v. Lane*, 57 Ind. 115; *Fort Wayne, I. & S. R. Co. v. Husselman*, 65 Ind. 73; *Louisville, N. A. & C. R. Co. v. Zink*, 92 Ind. 406; s. c., 20 Am. & Eng. R. R. Cas. 652; *Allyn v. Allyn*, 108 Ind. 327.

We have found no error in the record of this cause, which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Conveyance of Right of Way without Specified Width, Construed to mean as Wide as Company may Choose to Occupy.—*Indianapolis P. & C. R. Co. v. Rayl*, 3 Am. & Eng. R. R. Cas. 182.

When License to Enter upon Land may be Revoked.—There is a class of cases which follow the doctrine of the principal case, viz, that where acts

have been done in pursuance of a license and relying upon it, the license operates as an equitable estoppel, and the licensor will be estopped from revoking it to the injury of the licensee, so long as the license is not exceeded. See 1 Wood's Ry. Law, 609, citing *Bridge Co. v. Bragg*, 11 N. H. 102; *Lefevre v. Lefevre*, 4 S. & R. (Pa.) 241; *Ricker v. Kelly*, 1 Greenl. (Me.) 117; *Hepburn v. McDowell*, 17 S. & R. (Pa.) 888; *Cook v. Prigden*, 45 Ga. 331; *Houston v. Laffee*, 46 N. H. 505. In *Cook v. Prigden*, 45 Ga. 331, the court say: "But it does not follow that a license is revocable at the will of the party giving the license. Even a temporary license must be considered as intended to continue until the objects of the parties are attained, as where even in courts of law it has been held that a mere license to overflow land with water, by a dam for a saw-mill, cannot be revoked during the continuance of the dam; since it may fairly be presumed that the parties intended the license to last that long at least. But if the dam be destroyed, then, as the term of the license is out, it may be revoked, and this when the easement is a mere license, so that may be by parol."

And even though a parol license amounting in terms to an easement is revocable as to future enjoyment, at law, and is determined by a conveyance of the estate upon which it was to be enjoyed, this is not the rule in all cases in courts of equity. In these courts, the future enjoyment of an executed parol license, granted upon consideration, or upon the faith of which money has been expended, will be enforced at all events where adequate compensation in damages could not be obtained. This will be done upon the two grounds of estoppel on account of fraud, and specific performance of a partly executed contract to prevent fraud. *Snowden v. Wilas*, 19 Ind. 10. See also *Veghte v. Raritan, etc., Co.*, 19 N. J. Eq. 142; *Brown v. Bowen*, 30 N. Y. 548. It is also held that a license is not revocable without tendering the expenses incurred. *Woodbury v. Parshley*, 7 N. H. 739; s. c., 26 Am. Dec. 739. See also *Clafin v. Carpenter*, 4 Metc. (Mass.) 583. And when the license is coupled with an interest or grant it has been held irrevocable. *Long v. Buchanan*, 27 Md. 502; *Woodward v. Seeley*, 11 Ill. 157.

There are a number of authorities, however, which deny the doctrine of the principal case and hold that a parol license given by the owner of land to a railroad company to occupy the land for its road, followed by the expenditure of money in the construction of the road, is not irrevocable; but that it simply justifies the entry, and is revocable at the pleasure of the licensor. *Murdock v. Prospect Park, etc., R. Co.*, 73 N. Y. 579. In *Miller v. Auburn, etc., R. Co.*, 6 Hill (N. Y.), 61, it was held that in an action against an incorporated company for building and continuing a railroad on a street in front of the plaintiff's house, so as to obstruct his right of egress and ingress, the company might give evidence of a parol license from the plaintiff to build the road, and thus defeat his claim for all damages sustained while the license remained unrevoked; but that the right of occupying one's own land in such a manner as to deprive the adjoining owner of an easement cannot be acquired under a parol license, such license being revocable even after it has been executed. In *Hetfield v. Central R. Co.*, 27 N. J. L. 571, the defendant entered upon the plaintiff's land, and built its road under his verbal consent, but took no conveyance from him. The court held that it was not a consent that was intended to convey a title, and was revocable. In *Blaisdell v. Portsmouth, etc., R. Co.*, 51 N. H. 483, it is held that a license to build a railroad upon the licensor's land is a complete and full justification of any act necessary and properly done in the prosecution of the work while the license is in force; but that it may at any time be revoked, and from the time of such revocation ceases to be a protection. See also *New Orleans, etc., R. Co. v. Maye*, 39 Miss. 374.

In *Irish v. Burlington & S. W. R. Co.*, 44 Iowa, 380, by agreement of parties an appeal was taken from the assessment of damages and judgment

for the amount assessed was entered in such appeal, and execution thereon was stayed for two years, and the railroad was constructed through the property without objection. *Held*, that upon failure to pay the amount of the judgment at the time specified, the owner could proceed by injunction to restrain any further use of his property until compensation should be made. In *Morse v. Copeland*, 2 Gray (Mass.), 305, Metcalf, J., said: "The rule sometimes laid down in the books, that a license executed cannot be countermanded, is not applicable to licenses which, if given by deed, would create an easement; but to licenses which, if given by deed, would extinguish or modify an easement. The distinction sometimes taken in books, between a license to do acts on the licensee's own land, and a license to do acts on the licensor's land, is the same distinction that is made between licenses which, if held valid, would create, and licenses which extinguish or modify, an easement. Generally, if not always, a license which, when executed, extinguishes or modifies an easement, is, from the nature of the case, a license to do acts on the servient tenement—the tenement of the licensee."

Concerning this latter class of cases, Wood in his work on Railway Law, p. 612, says: "But the rule established by the better class of cases may be said to be, that a parol license to do an act upon the land of another which amounts to an easement therein, is void under the statute of frauds, and while affording a justification for acts done in pursuance thereof before it is revoked, may, at law, be revoked at the will of the licensor, without reimbursing the licensee for any expenditures made in executing it." Citing *Cook v. Stearnes*, 11 Mass. 533; *Morse v. Copeland*, 2 Gray (Mass.), 302; *Stevens v. Stevens*, 11 Metc. (Mass.) 251.

It is well settled that a licensor may revoke a license given under a misapprehension of its effect. *Allen v. Fiske*, 42 Vt. 462; *Brown v. Bowen*, 30 N. Y. 519; *Giles v. Simonds*, 15 Gray (Mass.), 441; *Eaton v. Winne*, 20 Mich. 156; *Smith v. Scott*, 1 Kerr (N. B.), 1; *Drake v. Wells*, 11 Allen (Mass.), 141; *Dodge v. McClintock*, 47 N. H. 883; *Miller v. State*, 39 Ind. 267; *Freeman v. Hadley*, 33 N. J. L. 523; *Druse v. Wheeler*, 22 Mich. 439. See also *Northern Pac. R. Co. v. B. & M. R. Co.*, 1 Am. & Eng. R. R. Cas. 8; note to *Currie v. Natchez, etc., R. Co.*, 20 Ib. 306; note to *Waldron v. Toledo, etc., R. Co.*, 20 Ib. 351; *Baltimore & Hanover R. Co. v. Algire*, 23 Ib. 145; s. c., 25 Ib. 147.

LAWRENCE

v.

MORGAN'S LOUISIANA AND T. R. AND S. Co.

(*Advance Case, Louisiana. April 18, 1887.*)

The owner of lands who allows a railroad company to occupy and use the same for the construction of its road, and other appurtenances necessary to the operation of a railroad, without remonstrance or complaint, will be held to have acquiesced therein; and such a waiver will bar his action to dispossess the company. But such a waiver will not defeat his right of action for damages or for the value of the lands thus taken from him.

The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its roads

and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like.

Such franchise includes the right of appropriating lands for the construction of necessary appurtenances without which the road could not be successfully operated.

Such a franchise is transferred, in a marshal's sale of a railroad and all its franchises, to the purchaser, even if he is a natural person.

APPEAL from civil district court, Orleans parish.

B. R. Forman for plaintiff and appellant.

Leovy & Kruttschmit for defendant and appellee.

POOHE, J.—Plaintiff appeals from a judgment rejecting his demand in a petitory action for the recovery of several tracts and strips of land situated in Morgan City, in the possession of the defendant company, and on which it has erected depots for freight and passengers, several railroad trucks, switches, workshops, coal-yards, cattle-pens, and steamboat landings and wharves, all used for the purpose of a common carrier both by land and water. Both parties claim title under Robert B. and Thomas T. Brashear, who once owned the plantation from which Morgan City was carved out, and which included the lands now in controversy. In addition to the plea of ownership through an alleged chain of title, the defendant company urges numerous other grounds of defence, among which is the averment that the present claimant and his alleged authors witnessed the possession of defendant of the several tracts of land in suit, were cognizant of the structures which the company placed thereon from the year 1857 to the date of this suit, as the needs of the business required; that none of them ever objected to the company's possession and use of the lands aforesaid for the purposes of the company's business as a common carrier; and that such acquiescence is a bar to plaintiff's action to dispossess the present corporation, which has lawfully acquired all the rights of its predecessors and authors.

Although we have considered all the other features and bearing of the case, we reach the conclusion that this defence finds ample support in the record, as well as in the law governing the case, and we shall rest our decision on that plea. The principle which underlies that ground of resistance was discussed before this court, and it received the serious attention which was commensurate with the importance of the results likely to flow therefrom, in the case of *St. Julien v. Railroad Co.*, 35 La. Ann. 924. In that case, under the guidance of most respectable authority, this court crystallized the principle into the following rule: "One who permits a railroad company to occupy and use his lands and construct its road (a *quasi* public work) thereon, without remonstrance or complaint,

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cannot afterwards reclaim it free from the servitude he has permitted to be imposed upon it. His acquiescence in the company's taking possession and constructing its works under circumstances which made imperative his resistance, if he ever intended to set up illegality, will be considered a waiver. But, while this presumed waiver is a bar to his action to dispossess the company, he is not deprived of his action in damages for the value of the land, or for injuries done him by the construction or operation of the road."

From the record we gather the following facts, which have a bearing on this branch of defence: The lands in suit are situated at the point which was for many years the actual terminus of the railroad, which had been built by the FURTHER FACTS. original incorporators, the New Orleans, Opelousas & Great Western R. Co., under a charter granted by the legislature of Louisiana in 1853, and under the obligation to continue the construction of the road west of that point, namely, Berwick's bay to the Sabine river. In divers transactions, some in 1853, some in 1856, and others in 1857, that corporation obtained grants of land for the construction of tracks, switches, depots, and other railroad appurtenances, from R. B. and T. T. Brashear, the then owners of these lands, and from their legal representatives. As the State of Texas soon became, in its trade with New Orleans, one of the principal feeders of the traffic of that road, it was found necessary, in view of the unfinished condition of the road, to reach Texas ports by steamers plying between the terminus of the road at Berwick's bay and sundry points in Texas. The needs of that kind of transportation soon required landing facilities at the bay for freight, live cattle, and passengers to and from the steamers, which resulted in additional grants of land, in order to meet the exigencies of the newly-developed purposes, from the then owners of the adjacent lands. In July, 1869, the road, with all its branches and franchises, was bought at a United States marshal's sale by Charles Morgan, who owned and operated it as the Morgan's Louisiana & Texas R. until April, 1878, when the whole was acquired by the defendant corporation by purchase from him. During Morgan's ownership many additions and improvements were made and erected in order to supply means necessary to a double transportation by land and water; and some additions have been made since the purchase of the present defendant. Many of these improvements called for additional appropriations of land, although many works were erected on water, and some railroad tracks were laid on portions of the public streets, with permission of the municipal authorities of Morgan City.

Now, plaintiff rests his claim of ownership under a probate sale made in the succession of R. B. and T. T. Brashear in May, 1871, and many of the improvements or works for which additional tracts or strips of the lands which he claims were used have been erected

since the date of his purchase; and, although he was all that time a resident of the place, the record is barren of any proof of the slightest remonstrance or complaint on his part against the acts of the company, either under Morgan or under the present corporation. As to his predecessors, the proof of their acquiescence in every act of either the old company or of Morgan, in occupying portions of their lands for the purpose of their *quasi* public works, which they were almost continuously erecting, is still more affirmatively shown. Such an acquiescence dates as far back as 1857. Then the owners of the Brashear plantation laid out a town at that point, which in time became Brashear City, the name being afterwards changed to Morgan City. On their sale maps, they marked out and specially designated the various portions of their lands which they then and thus dedicated to the use of the railroad company. This express consent, which is more than an acquiescence, to the occupation by the company of the far greater portions of the lands now in suit, is contained in the various acts of transfer and grants which we have hereinabove referred to.

We note that these transfers are alleged by plaintiff to be null and void, for many reasons not necessary to be herein mentioned. For the purposes of the present discussion we are not required to pass upon that contention, as our consideration of them has been specially restricted to their effect as *indicia* of acquiescence, or absence of remonstrance or complaint, and not as muniments of title.

Plaintiff also contends that the acquiescence of his authors and of himself cannot benefit the alleged encroachment of Morgan during his ownership, because a natural person cannot exercise corporate rights. But this argument has already been met and answered in several adjudications of this court and of the supreme court of the United States in suits involving the discussion of the very rights which Morgan had acquired under his purchase of the Opelousas Railroad in 1869. In the case of *Morgan v. Louisiana*, 93 U. S. 217, the supreme court, in defining what were the franchises which the purchaser of the road had acquired at the marshal's sale, said: "But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of a corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked." It takes no argument to show that the foregoing description impliedly includes the right of appropriating strips of land necessary to the construction of depots,

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CORPORATE
RIGHTS BY NA-
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cattle-pens, coal-bins, sheds, and the like, without which this road could not have been successfully operated. *State v. Morgan*, 28 La. Ann. 482; *Fazende v. Morgan*, 31 La. Ann. 549; *St. Julien's Case*, 35 La. Ann. 924. Under the force of these authorities we hold that, as one of the rights acquired by Morgan under his purchase, he became vested with all the franchises of the Opelousas Railroad Corporation, whose road was a *quasi* public work, for the successful operation of which was included the right of appropriating lands necessary for the construction of indispensable works.

Under the conclusions which we have reached, the defendant company is left in the occupation of the lands in suit, and plaintiff is not stripped of the right to urge such claims as he may have for the damages which may have been inflicted on him, or for the value of the lands which may have been taken from him.

Judgment affirmed.

TODD, J., excuses himself.

Ejectment against Railroad Company entering on Land without Condemnation.—The cases upon this subject are all collected in the note to *Chicago, etc., R. Co. v. Taylor*, 22 Am. & Eng. R. R. Cas. 123-126.

The Power of Eminent Domain is a Franchise.—*Chicago & W. L. R. Co. v. Dunbar*, 1 Am. & Eng. R. R. Cas. 214.

The Right of Eminent Domain—How Granted.—The right of eminent domain is one which must be expressly conferred either by special act of incorporation, or by the general law under which the charter is obtained. *Morawetz on Corporations* (2d Ed.), § 768; *Taylor on Corp.* § 163.

In *Thatcher v. Dartmouth Bridge Co.*, 18 Pick. (Mass.) 501, the defendant corporation in an action of trespass pleaded its incorporation by statute whereby it was authorized to erect a bridge at a given point. The act did not, however, provide for any mode of ascertaining or paying damages to owners of land, and did not expressly give the corporation authority to take land without the consent of the owners. Shaw, C.J., said: "It is not to be presumed that such a power is intended to be granted unless the intent to do so can be clearly discovered in the act itself. In the present case there is no such power in terms, and we think, there is none by implication."

In *Phillips v. Dunkirk, W. & P. R. Co.*, 78 Pa. St. 177, ejectment was brought by the owner of land against a railroad company that had occupied the bed of a public turnpike road over the plaintiff's land, and had constructed a new road, upon which the original road was abandoned as a turnpike, but without any formal vacation by the court, Gordon, J., said: "The right of eminent domain is a very high and arbitrary one, and arises only *ex necessitate rei*, and will not be presumed to exist in a corporation, unless by express legislative grant." If any doubt remains as to the extent of the power, it must be decided adversely to the claim. *East St. Louis v. St. John*, 47 Ill. 463.

Individuals as well as corporations may be delegated by the State to exercise the power of eminent domain. *Cooley on Constitutional Lim.* (4th Ed.) 672.

How Lost or Transferred.—The right of eminent domain, being simply a franchise, will expire along with the other franchises of the corporation, either by express limitation of time in the incorporating act or the general law under which the charter is obtained, or by forfeiture under judicial proceedings. In the matter of the *Brooklyn, W. & N. R. Co.*, 72 N. Y. 245,

the B. W. & N. R. Co. was organized under the general railroad act of New York, but did not comply with the condition of the act requiring every such corporation to begin the construction of its road and expend 10 per cent of its capital stock thereon within five years. Subsequently an act was passed reviving the corporation, and extending the time for three years. This act also was not complied with. In proceedings for condemnation, *held*, that the corporation had ceased to have the power of eminent domain.

In *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 N. Y. 524, where almost precisely the same point was ruled, Earle, J., said: "In the case supposed by the learned counsel for the appellant of a road for one hundred miles under the general railroad act, only ninety-nine of which have been completed within the ten years limited by that act as amended in 1867, it may well be that the road could continue to do business and operate the ninety-nine miles until the intervention of the courts in an action by the attorney-general in behalf of the people. But under the law as we have laid it down in this and the prior case, it could not take private property or a public street for the construction of the last mile. Its corporate right for that purpose would be absolutely gone."

The power to transfer or mortgage its franchises by a corporation is itself a franchise, and the transfer or mortgage can confer rights upon the transferee or mortgagee only when thus done under authority of law and in accordance therewith.

In *Mahoney v. Spring Valley Water Co.*, 52 Cal. 159, a water-works company, authorized to appropriate and condemn certain water and land property, commenced proceedings of condemnation, and then sold out its right to condemn this property to another company incorporated for the same purpose. The proceedings were continued by the purchasing company, but in the name of the original company. In an action to recover the award, *held*, that the condemnation was illegal, the second company having acquired no right of eminent domain by the purchase. In the *Susquehanna Canal Co. v. Bonham*, 9 W. & S. (Pa.) 28, Sergeant, J., said: "It has therefore always been held, and our acts of assembly are constructed on that idea, that the franchises and corporate rights of the company, and the means vested in them which are necessary to the existence and maintenance of the great public object for which they were created, are incapable of being granted away and transferred by any act of the corporation itself or by process of another against it *in invitum*."

In *Richardson et al. v. Sibley*, 11 Allen (Mass.), 65, it was held that a street railway company had no power to mortgage its franchises, road, or property without legislative authority. See also *Randolph v. Larned*, 27 N. J. Eq. 557. And generally that a railroad company cannot transfer or mortgage its franchises without statutory authority. *Pullman v. Cin. R. Co.*, 4 Biss. (C. C.) 35; *Coe v. Col. etc., R. Co.*, 10 Ohio St. 372; *Stener's Appeal*, 27 Pa. St. 313; *Pierce v. Emery*, 32 N. H. 484; *Black v. Del. & R. Can. Co.*, 7 C. E. Green (N. J.), 99; *Hendee v. Pinkerton*, 14 Allen (Mass.), 381; *Lanman v. Leh. Val. R. Co.*, 30 Pa. St. 42; *Troy & R. R. Co. v. Kerr*, 17 Barb. (N. Y.) 601; *Woodruff v. Erie R. Co.*, 25 Hun (N. Y.), 247; *Carpenter v. Blk. Hawk Gold Min. Co.*, 65 N. Y. 43; *Stewart v. Jones*, 40 Mo. 140; *Daniels v. Hart*, 118 Mass. 543; *Phila. v. W. Un. Tel. Co.*, 11 Phil. (Pa.) 327.

But the legislature may give a corporation power to mortgage its franchises. *Atkinson v. Marietta, etc., R. Co.*, 15 Ohio, 21; *McAllister v. Plant*, 54 Miss. 106; *State v. Morgan*, 28 La. Ann 482; *St. Paul R. Co. v. Parcher*, 14 Minn. 297; *Pierce v. Mil., etc., R. Co.*, 24 Wis. 551; *East Boston Fr. R. Co. v. East. R. Co.*, 18 Allen (Mass.), 422.

It sometimes happens that the general corporation laws of the State provide for the merger or consolidation of corporations, by means of which one company may acquire by purchase the rights and franchises of another; as

in *Pennsylvania*, where the act of April 17, 1876, (P. L. 38), provides that in pursuance of certain forms, "it shall be lawful for any corporation [in the same manner] to sell, assign, dispose of, and convey to any corporation created under, or accepting the provisions of this act, its franchises, and all its property, real, personal and mixed, and thereafter such corporation shall cease to exist, and the said property and franchises, not inconsistent with this act, shall thereafter be vested in the corporation so purchasing as aforesaid." Such a law exists in *Nebraska*. *Chicago, St. P., M. & O. R. Co. v. Lundstrum*, 21 Am. & Eng. R. R. Cas. 528. And in *West Virginia*. *Ches. & Ohio R. Co. v. Miller*, 114 U. S. 176.

In case of a mortgage in pursuance of statutory authority there arises the question discussed in the principal case.

Franchises of Road pass to Purchaser at Foreclosure Sale.—When there has been a judicial sale of a railroad property under a mortgage authorized by law, covering its franchises, it is now well settled that the franchises necessary to the use and enjoyment of the railroad passed to the purchasers. *New Orleans, etc., R. Co. v. Delamore*, 114 U. S. 501. The court say: "It follows that if the franchises of a railroad corporation essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property, upon the bankruptcy of the company, carries the franchises, and they may be sold and passed to the purchaser at the bankruptcy sale."

This was also assumed to be the law by the opinion of the court pronounced by Mr. Justice Matthews in the case of *Memphis R. Co. v. Commissioners*, 112 U. S. 609, when it was said: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders or the purchasers at a foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it and the franchise of maintaining and operating it as such." See also *Hall v. Sullivan R. Co.*, 21 Law Rep. 138; *Galveston R. v. Cowdrey*, 11 Wall. (U. S.) 459.

A grant of authority to a railroad company to sell or mortgage "its property and franchises" enables the company to sell or mortgage, not only those rights and franchises which are essential to the use of the property as a railroad, but also those which are incidental without being essential. Thus a purchaser, under a sale of the company's property and franchises pursuant to such authority, would acquire the power of exercising the power of eminent domain to complete the construction of the railroad, and to build branch lines, if that was one of the franchises of the company owning the railroad. *North Carolina, etc., R. Co. v. Carolina Cent. R. Co.*, 83 N. Car. 489; *Morawetz Corp.* (2d Ed.) § 934. But a lease by one railroad corporation of its railroad for a hundred years to another does not vest in the lessee any power to exercise the right of eminent domain, but this power remains in the lessor, and the legislature may deal with the lessor exclusively in amending its charter. *Mayor, etc., of Worcester v. Norwich, etc., R. Co.*, 109 Mass. 103.

The exemption from taxation, however, is a personal privilege of the corporation to which it is granted. It will not pass to purchasers from the railroad company at a foreclosure sale. *Trask v. Maguire*, 18 Wall. (U. S.) 391; *Morgan v. Louisiana*, 93 U. S. 217; *Railroad Co. v. Gaines*, 97 U. S. 697; *East Tenn., Va. & Ga. R. Co. v. Hamblen Co.*, 102 U. S. 273; s. c., 2 Am. & Eng. R. R. Cas. 652; *Wilson v. Gaines*, 103 U. S. 417; s. c., 6 Am. & Eng. R. R. Cas. 627; *Louisville & N. R. Co. v. Palmes*, 13 Am. & Eng. R. R. Cas. 380; *Memphis, etc., R. Co. v. Berry*, 112 U. S. 609; *Ches. & Ohio R. Co. v. Miller*, 114 U. S. 176. But the legislature may, of course, unless restricted by the provisions of the State constitution, confer immunity from taxation upon the corporation formed by the purchasers of a railroad at a foreclosure sale. Such a result may be inferred from the terms of a general act granting

to the new corporation the rights, powers, and privileges of the old one, where, from the context or surrounding circumstances such intent may be inferred. *Humphrey v. Pegues*, 16 Wall. (U. S.) 244; *Atlantic & G. R. Co. v. Allen*, 15 Fla. 637; *State v. Winona & St. P. R. Co.*, 21 Minn. 815; *State v. South Minn. R. Co.*, 21 Minn. 844; *Louisville & N. R. Co. v. Gaines*, 3 Fed. Rep. 266; *Nicholls v. New Haven & N. R. Co.*, 42 Conn. 103. But a general grant to the new company of the rights, powers, and privileges of the old one will not exempt it from taxation where such an intent does not clearly appear. *Maine Cent. R. Co. v. Maine*, 96 U. S. 499; *Central R. & B. Co. v. Georgia*, 92 U. S. 655; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359; *Mobile & M. R. Co. v. Steiner*, 61 Ala. 559; *St. Paul & P. R. Co. v. Parcher*, 14 Minn. 297.

PIEDMONT AND CUMBERLAND R. CO. v. SPEELMAN.

MAYER *et al.* v. PIEDMONT AND CUMBERLAND R. CO.

(*Advance Case, Maryland. June 21, 1887.*)

By the general railroad law of Maryland it is required that the certificate of incorporation of a railroad company shall state the names of the termini of the road, and the county or counties, city or cities, through which it is to pass. *Held*, that it is a sufficient compliance with the requirements of the law that the termini be fixed in the State of Maryland with reasonable certainty, and the cities, etc., through which the road is to pass be specified; and the fact that the certificate describes the route of the road as running partly through the State of West Virginia does not invalidate the incorporation of the company under the general law of Maryland, its termini being in that State.

A court of equity will not lend its aid to an assignee of a lease of land through which a railroad company seeks to condemn a right of way, and enjoin it from so doing, when it is shown that the assignee is the president of a rival road, and denies the power of the first company to condemn the land under its charter, but will leave him to his remedy at law.

The assignee of a lease of land through which a railroad company desired to obtain a right of way refused to sell, and the railroad company supposed it had no power under its charter to condemn his interest. Proceedings in which the original lessee had been made a party had been instituted and failed. *Held*, that the remedy of the railroad company was not by bill for injunction against the assignee, but to amend the charter.

APPEALS from orders of the circuit court for Alleghany county, in suits in equity for injunctions.

Argued before Alvey, Ch. J., Miller, Robinson, Yellott, Bryan and Stone, JJ.

The facts are stated in the opinions.

William Walsh and *William J. Read* for appellant in first case.

William Walsh and *William J. Read* for appellee in second and third cases.

W. I. Cross and *W. F. Frick* for appellee in the first and for appellants in the other two cases.

STONE, J.—These are three cases on the special docket of this term that are all parts of one transaction, and are so inseparably connected together that one opinion will dispose of the whole of them. The facts of these several cases are so interwoven that one cannot be properly considered by itself, but justice requires them to be considered together.

The history of this litigation can be very briefly stated:

The Piedmont & Cumberland R. Co. was organized under the general railroad law of this State for the purpose of constructing a railway in Alleghany county, beginning at a point FACTS. above Westernport, and running down to Cumberland. The corporation began the work of constructing the road, and continued perhaps more than half its projected line until it came to a small farm in Maryland, called the Cookerly farm, and at that point the difficulties began. It seems that it agreed with the owners in fee of this farm as to the right of way; but as some of these were minors it was concluded to condemn it, and an inquisition was duly held and ratified by the court. A man by the name of Speelman, however, claimed to be a tenant on this farm, and to hold it under a lease for two years. When the Piedmont & Cumberland R. Co. undertook to condemn the right of way through the Cookerly farm it made this man, Speelman, a party to the proceedings, and the jury valued his interest at \$200.

When the finding was returned to court Speelman objected to the confirmation of the inquisition, upon the ground that the railway company had no power under its charter to condemn the land; and the court did set aside the inquisition as to Speelman, but confirmed it as to the Cookerlys, and the judgment seems to have been paid them. It should be stated that before these condemnation proceedings were begun, which was on 1st of October, 1886, Speelman, to wit, on the 8th of September, 1886, had obtained an injunction against the company prohibiting it from going on the land. The ground upon which he obtained the injunction was that he had a lease on the farm, and the company had not agreed with him as to compensation, and had not condemned his interest. The company alleges, and probably with truth, that at the time it agreed with the Cookerlys it had no knowledge of the claim of Speelman.

At any rate, immediately after the injunction was obtained by Speelman the company commenced the condemnation proceedings, which resulted, as we have seen, in setting aside the inquisition as to Speelman, probably upon the ground that the charter of the company did not authorize the condemnation at that point.

From this decision of the circuit court in setting aside this

inquisition as to Speelman all the subsequent litigation in these cases has sprung. Immediately after that decision, a rival and hostile corporation, the Cumberland & Pennsylvania road, by its president, Mr. Mayer, appears upon the scene, and, having purchased the right of Speelman to this land, has exhausted every legal expedient to hinder and delay the building of the road. As, however, the important question in the case is the validity of the charter of the Piedmont & Cumberland road, we will first consider that.

That company was organized under the general railroad law of the State. That law provides that the certificate of incorporation shall specify: "First, the name assumed by such company, and by which it shall be known; second, the names of the places of the termini of said road, and the county or counties, city or cities, through which such road shall pass; third, the amount of capital stock necessary to construct such road." A subsequent section provides: "That whenever any railroad company heretofore incorporated, or which may hereafter be incorporated, shall find it necessary for the purpose of avoiding annoyances to public travel, or dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundations, or for other reasonable causes, to change the location or grade of any portion of their road, whether heretofore made, or hereafter to be made, such railway company shall be and are hereby authorized to make such changes of grade and location; not departing from the general route prescribed in the certificate of such company."

The point of the objection to the charter is that it does not pursue the route laid down in its charter. The charter on that point is in these words: "2. We do further certify that the said corporation so formed is a corporation for the purpose of constructing and operating a railroad in Maryland, beginning at a point in Alleghany county, in said State, opposite to the junction of the West Virginia Central & Pittsburg R. Co. with the Baltimore & Ohio R. Co. above Piedmont, in West Virginia; running thence through or near to the town of Westernport, in Alleghany county, Maryland, to a convenient point below Keyser, in West Virginia, where it may cross the north branch of the Potomac River into West Virginia, and also from a convenient point on the north branch of the Potomac, at or near the city of Cumberland, in Alleghany county, Maryland, to another convenient point adjacent thereto, all of the said road passing through Alleghany county, in the State of Maryland."

There is no pretence that the termini of the road are not designated in its charter with reasonable certainty. It is to run from a point in Alleghany county, opposite the junction of the West Virginia Central & Pittsburg R. Co., with the Baltimore &

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GENERAL RAIL-
ROAD LAW AS TO
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DOWN IN THE
CHARTER — FIX-
ING THE TERMINI
IN THE STATE.

Ohio R. Co., to a convenient point adjacent to Cumberland. Nor is there any difficulty as to the "cities." The charter only calls for one town, Westernport, and that the road runs to now. But the charter says that at a convenient point below Keyser, the road may cross the Potomac into West Virginia, and also from a convenient point on the Potomac at or near the city of Cumberland to another point adjacent thereto.

The meaning of this latter clause undoubtedly is that the road was expected to be built from the place where it first crossed the Potomac into West Virginia on the West Virginia side of the river until it recrosses into Maryland near Cumberland. If the road had been so built or attempted to be, would it have been a valid charter, and could the land adjacent to Cumberland have been properly condemned? For we must all concede that if a railroad organized under the general law attempts to condemn property outside of its legal route, the inquisition will be enjoined.

The general railroad law of this State is a remedial statute and is therefore to be construed liberally. Good faith and reasonable certainty is all that is required. In passing that law the legislature distinctly recognized the benefit of railroads to the community, and did away with the old, cumbersome and expensive mode of obtaining by legislative action the right to build them. It was the manifest object of that law to enlarge and not to restrict the construction of railroads. The general railroad law (Act of 1876) stands in the place of, and is a substitute for, the old special charter; and if the rule laid down in the certificate of the Piedmont & Cumberland R. would have been sufficiently certain in a special charter, I apprehend that it will be sufficient in this charter. The meaning of the charter of the Piedmont & Cumberland road was that at a convenient point below Keyser it should cross the Potomac into West Virginia, and run down on the West Virginia side of the river until near Cumberland, when it should recross into Maryland and find its southern terminus near that city.

Now, I cannot perceive why that is not a perfectly valid charter. The fact that the road runs through two States does not make it two roads. The Baltimore & Ohio runs from Maryland into West Virginia and back again into Maryland without losing its identity as one road, or any difficulty being perceived in its special charter giving it that privilege. If there is no objection in giving such privilege by special charter, where is the objection to such charter under the general law?

The case of *Re New York, Lackawanna & Western R. Co.*, 88 N. Y. 279, is, I think, a case in point. In that case, after the incorporation under the general railroad law of New York, which is in that respect like ours, the directors came to the conclusion that a part of the road should be run through the State of Pennsylvania, and this route necessitated a change of a county in New York

through which the road was to run. They took steps to do this by amending their charter; but the court of appeals of that State decided that it was unnecessary to amend, as they had power under their certificate to make the change. No question whatever was made of the power of the road, in order to straighten its line, or for any other proper cause, to run into an adjoining State and return. Of course the State of Maryland has nothing to do with the road in West Virginia; but it can permit, by either general or special law, the road to run beyond her limits and return.

No possible reason can exist why under the general law a railroad lying on the border of a State may not be built partly in one State and partly in another. The conformation of the country may make it a necessity to do so, or the public interest, which as Mr. Wood says is the interest of the stockholders, may make it desirable to do so. For these reasons we think that a road lying near the border line between two States may lie partly in one and partly in the other. The law of this State requires the termini to be fixed in this State with reasonable certainty, and the cities (if any) through or near which the road is to pass. We think the termini have been fixed in this State, good faith observed, and the towns named.

But another objection is raised against the charter; and that is that after crossing into West Virginia at a convenient point below Keyser, it re-crossed into Maryland before it reached the point near Cumberland.

The charter, as I construe it, only gives the road permission to go to West Virginia; but it certainly does not compel it to go to West Virginia and stay there until near Cumberland. In the nature of things a Maryland law could not compel a corporation to go out of the State; all it could do is to give it permission to do so.

But that question seems to me to be disposed of by the twelfth section of the Act of 1876; that provides that for any reasonable cause the road may make a change in its location, provided it does not depart from the general route prescribed by its charter. An inspection of the map will show that this road has not departed from the general route prescribed by the charter. Its general route is by its charter (on that part) is from below Keyser to Cumberland; and it has pursued that route in a line straighter and more direct than the boundary line (the Potomac) between the two States. The crossing and recrossing the river was evidently only to avoid the natural obstacles difficult to surmount, and made the line more direct.

I am, therefore, of opinion that the Piedmont & Cumberland road has full power, under its charter, to locate and build the road where it has located it, and as a necessary consequence the full

CROSSING INTO
WEST VIRGINIA
AND RE-CROSS-
ING INTO MARY-
LAND.

power and authority to condemn a right of way over the Cookerly farm.

This main question being settled, the several cases may be disposed of without much difficulty; and first as to the case of Speelman.

He having alleged in his bill that he had an interest as tenant, and which, *prima facie*, we think he had, and that he had not been paid by the railroad company, nor his interest condemned, he was entitled to an injunction until, by one or the other of these modes, the railroad company had acquired the right to go on the land. But, inasmuch as it is clearly shown that at the time of the trial of this case in the court of appeals he had parted with his interest and had no longer any interest in the subject-matter of the suit, the order for the injunction must now be reversed, and the bill dismissed.

TENANT PART-
ING WITH INTER-
EST—ORDER FOR
INJUNCTION RE-
VERSED.

But Mayer, his assignee, filed a bill subsequently, on March 30, 1887, alleging, among other matters, the same thing that Speelman had, that is, that his interest had not been paid for or condemned, and asking an injunction, which was refused.

PARTY PUR-
CHASING TEN-
ANT'S INTEREST
TO THROW OB-
STACLES IN THE
WAY WILL NOT
BE AIDED.

Under ordinary circumstances Mayer would have been entitled to an injunction to restrain the entry of the road upon the leased premises, until either by agreement or condemnation he was paid for his interest.

But the several records now before the court disclose beyond a reasonable doubt that the purchase of Mayer of this lease was for the sole purpose of throwing obstacles in the way of the completion of the road; and that the purchase of the lease was made in the interest of a rival road, of which he was president, and after he believed that the charter of the Piedmont & Cumberland road did not authorize a condemnation there.

Whatever may be the mere legal rights of the complainant he must assert them in the courts of law, as a court of equity will not lend its aid to further so discreditable a scheme, and the order refusing the injunction will be affirmed. *Wood v. Charing Cross R. Co.* 33 Beav. 291.

The third and last case is that of *The Road v. Mayer and others*, No. 6, special docket, in which an injunction was granted the road against Mayer and others. This injunction was granted in February, 1887, and after the road had attempted to condemn the interests of Speelman and had failed to do so. It is also apparent that no agreement had been made with Mayer, the assignee. The case as it then appeared was this: the owner of the lease would not sell and the road supposed it could not condemn the interest. By making Speelman a party to the inquisition it acknowledged that he had a claim of which it had notice. But we fail to see how these facts authorized a resort to a bill for an injunction. If no

agreement could be reached, and the road supposed it had no right to condemn, an amendment of its charter was the only remedy, and not a resort to an injunction; and that case must be reversed and the bill dismissed.

We do not think it necessary to notice many points raised in the argument. The view we have taken disposes of the whole of these cases.

Order reversed with costs, and bill dismissed, in the case of the Piedmont & Cumberland R. Co. v. Speelman.

Order reversed with costs, and bill dismissed, in Mayer *et al.* v. Piedmont & Cumberland R. Co.

Order affirmed with costs in Mayer v. Same.

Separate opinion by ALVEY, Ch.J. (concurring in part, and dissenting in part).—I entirely concur in the result of the opinion, whereby these cases have all been dismissed, as being without equity to support them. But I do not agree in that portion of the opinion which treats of the construction of the Act of 1876, chap. 242, and the certificate of incorporation of the Piedmont & Cumberland R. Co., granted under that act. I shall, therefore, state briefly my views of these cases, and of the rights and powers of the Piedmont & Cumberland R. Co. derived through its certificate of incorporation, under the Act of 1876.

There are three cases, and three several appeals, all brought here from orders of the court below, passed upon mere *ex parte* presentations by the complainants, by their several bills. All the bills relate to the same subject-matter of contest; and in each bill an injunction is prayed. While the cases were not in fact all argued together, as they well might have been, they were all argued by the same counsel, representing the same opposing pretensions in each case; and all three cases, therefore, may well be considered and disposed of together, in one opinion.

The first case in the series is that of Speelman, the alleged tenant, against the Piedmont & Cumberland R. Co., in which the latter is sought to be restrained from entering upon and constructing its road over the land held by the complainant, as tenant, his interest in such land, embraced within the location of the road-way, not having been purchased or condemned by the defendant. The bill was filed on the 8th of September, 1886, and an *ex parte* order for an injunction was obtained the same day. After the injunction was issued, the defendant, by taking an appeal and giving bond, dissolved the injunction and proceeded with its work on the road.

The allegations of the bill furnish sufficient ground for an injunction; and if this bill stood alone, without regard to subsequent disclosures as to the changed relation of the complainant to the subject-matter of contest, the order appealed from would have

SPEELMAN'S
RIGHT TO AN IN-
JUNCTION.

to be affirmed, and the injunction restored. *Balt. & O. R. Co. v. Thompson*, 10 Md. 76; *New Cent. Coal Co. v. George's Creek Coal, etc., Co.* 37 Md. 539, 566.

But, by the bill subsequently filed by Charles F. Mayer, as assignee, against the Piedmont & Cumberland R. Co., founded upon the same alleged right of Speelman, the tenant, alleging the utter absence of power in the defendant to acquire the proposed right of way for its road, and praying the same relief as that prayed in the previous bill by Speelman, it is shown that Speelman, on the 10th of January, 1887, assigned all his right, title and estate, in and to the leasehold premises, to Charles F. Mayer, president of the Cumberland & Pennsylvania R. Co. The Piedmont & Cumberland R., when completed, will be a rival and competing road with that of the Cumberland & Pennsylvania R.; and the company owning this last-mentioned road has many interests that will be in conflict with the successful operation of the road of the defendant when completed. In view of the circumstances disclosed it is not a matter of doubtful conjecture as to the motive and object of obtaining the assignment of the lease from Speelman to Mayer. Indeed, that object is not attempted to be concealed.

SPEELMAN'S ASSIGNMENT—MOTIVE—NOT ENTITLED TO SAME REMEDY.

It thus appears that Speelman has no longer any interest in the subject-matter of the contest, and is, therefore, not entitled to have the injunction granted or his bill restored by an affirmance of the order appealed from. Nor is Mayer entitled to an injunction on his bill; for it is conceded that he knew of the purpose, and of the steps taken by the defendant company, to procure the right of way for its road over the leased premises, and that he had no other motive or purpose in obtaining the assignment of the lease from the tenant than that of obstructing and, if possible, totally defeating the construction of the defendant's road over the land embraced in the lease. This being the fact, whatever might be the determination of a court of law in respect to it, it is very certain that a court of equity will lend no aid to give effect to such a transaction. In the view of that court such a contract, entered into for such a purpose, is not only against conscience, but against public policy, and will not be enforced or allowed effect as against the party or company sought to be prejudicially affected. It has been held, upon full consideration, that a railroad company has no right to purchase land, merely to prevent a rival company from obtaining it, or for purposes of obstruction or speculation; nor could it be purchased in the name of an officer of the company for the latter's benefit, for any such purpose. *Rensselaer, etc., R. Co. v. Davis*, 43 N. Y. 137; *1 Morawetz Corp.* § 394, and cases there cited.

It is not claimed or pretended that Mr. Mayer would have had anything to do with the lease but for the fact of his relation to the rival road owned by the Cumberland & Pennsylvania R. Co.; and

that the assignment of the lease was obtained in the interest and behalf of that company is clearly shown upon the face of the assignment itself, for it is made in terms to Mayer as president of the Cumberland & Pennsylvania R. Co. There is no room to doubt that the assignment was obtained solely for purposes of obstruction, and to furnish the foundation for litigation with the rival company, whereby advantages might be obtained by delay, and from such embarrassment to that company as would likely result from persistent and protracted litigation in regard to its right of way. To accomplish such purposes a court of equity will not for a moment lend its aid, or give to the attempt the slightest countenance. *Ffooks v. Southwestern R. Co.*, 1 Sm. & Giff, 142; *Hartford, etc., R. Co. v. New York, etc., R. Co.* 3 Rob (N. Y.) 411.

The court below was, therefore, clearly right in refusing the injunction prayed by the bill filed by Mayer against the Piedmont & Cumberland R. Co.

But while neither Speelman nor Mayer has any equitable ground for calling into active exercise the powers of a court of equity, on the bills filed by them, as the facts are now disclosed, the Piedmont & Cumberland R. Co. is equally without right to invoke the assistance of the court on its bill, filed against Mayer and others. Mayer and his men were in possession of the premises, claiming under Speelman. To entitle the railway company to aid from the court, it was incumbent upon it to show clearly a superior right to that of Speelman, or any one claiming under him. This it has wholly failed to do. That Speelman had an interest in the farm is shown by the lease exhibited, and the accompanying possession under it; and his right or interest was fully conceded by the railway company, in the proceedings taken to condemn his interest in the location of the road through the farm. The condemnation proceeding failed, because of the decision of the circuit court that there was no power in the railway company, under its certificate of incorporation, to take such proceeding to acquire a right of way in that location *in invitum*.

That decision was a finality as to the rights involved in that case, and there could be no review of it, and especially not by a court of equity, that court having no power to reverse the judgment of the circuit court rendered in a condemnation proceeding under the statute.

It is clear, then, that there was no sufficient ground shown in the bill filed by the railway company for an injunction; and there was, therefore, error committed by the court below in the order passed thereon granting the injunction. And this bill, as well as the other two bills, has been properly dismissed by the opinion of this court. To this extent we all agree, as I understand the opinion;

and thus all the cases are fully disposed of, without anything more necessary to be said in regard to them.

But the majority of the court, in the opinion filed, have deemed it proper to go further, and to declare their construction of the certificate of incorporation with the railroad company, in connection with the provisions of the statute under which the certificate was granted, as to the right of the company to make location of its road. It is to this part of the opinion that I do not assent.

By the certificate of incorporation, a railway company by the name of "The Piedmont & Cumberland R. Co.," was incorporated in April, 1886; and there was another company of the same name incorporated under the law of West Virginia, for the construction of a railroad from Piedmont to Cumberland. The town of Piedmont, in West Virginia, and the city of Cumberland, in Maryland, are both on the north branch of the Potomac river, and are some twenty odd miles apart by the course of the river. By the certificate of incorporation under the general railroad incorporation law of this State, it is declared that the corporation formed is "for the purpose of constructing and operating a railroad in Maryland, beginning at a point in Alleghany county, in said State, opposite the junction, etc., above Piedmont, in West Virginia, and running thence through or near to the town of Westernport, in Alleghany county, Maryland, to a convenient point below Keyser, in West Virginia, where it may cross the north branch of the Potomac River into West Virginia; and also from a convenient point on the north branch of the Potomac, at or near the city of Cumberland, in Alleghany county, Maryland, to another convenient point adjacent thereto, all of the said road passing through Alleghany county in the State of Maryland."

The road has been, for much the greater part of the way, actually constructed. By an illustrative map, used in the argument, it is shown that from the western terminus to the convenient point below Keyser, the route prescribed in the certificate of incorporation had been pursued, in the location and construction of the road; and at the latter point it has been taken across the river into West Virginia, to connect and run with the road of the Piedmont & Cumberland R. Co. in that State. In the bill filed by the railway company it is expressly admitted and averred that the two roads, the one in Maryland and the other a West Virginia road, were intended to form a continuous line from the commencement above Piedmont to the city of Cumberland. The road crosses and recrosses the river several times; but, as will be observed, there is no route prescribed in the certificate for the road on the Maryland side of the river, from the point where the road first crosses to the West Virginia side below Keyser, to the point on the river at or near Cumberland; and the road approaches this latter point for several miles on the West Virginia side of the river, and from

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which it crosses the river to enter Cumberland. The Cookerly farm, the *locus in quo*, is some two or three miles below the point where the road first crosses the river below Keyser, and some thirteen or fourteen miles above Cumberland.

Looking to the route as prescribed in the certificate of incorporation, and to the subsequent manner of location and construction of the road, it is too clear for question that it was no part of the plan of the road, when the certificate of incorporation was executed, that any portion of the line should be located in Maryland after it crossed the river below Keyser, until it reached the point at or near Cumberland, by the route on the West Virginia side of the river. And if such was the intention of the incorporators at the time of the execution of the certificate, and that is made manifest by the certificate itself, it is certainly clear that no mere subsequent change of purpose could confer upon them the right to adopt a different route. The statement in the certificate that all of said road passes through Alleghany county means, of course, that so much of the route as is prescribed in the certificate passes through that county, which is strictly the fact.

It is fully conceded by all, as I understand the position taken, that it was the original intention of the incorporators to connect their road below Keyser with the road of the same name on the West Virginia side of the river, and to make a continuous line by the use of that road or route down to a point opposite to Cumberland, where it would recross the river and come into the city. Indeed, all the facts of the case, as well as the route described in the certificate of incorporation, plainly show such to have been the intention.

But it is supposed that the difficulty, growing out of the fact of the change of route from that originally contemplated by the incorporators at the time of the execution of the certificate of incorporation, and as described therein, may be obviated by force of the provisions contained in section 12 of the Act of 1876, chap. 242. I have not, however, been able so to read that section of the statute.

It is in that section provided that whenever any railroad company shall find it necessary for the purpose of avoiding annoyance to public travel, or dangerous or difficult curves or grades, or unsafe or unsubstantial ground or foundations, or for other reasonable causes, to change the location or grade of any portion of its road, whether heretofore made, or hereafter to be made, such railroad company shall be authorized to make such changes of grade and location, "not departing from the general route prescribed in the certificate of such company."

It thus appears to be necessary, by the plain terms of the statute, that the general route of the intended road shall be prescribed in the certificate of incorporation; and the route so prescribed cannot be departed from, except in the manner and to the extent as pro-

vided for in the twelfth section of the act. This provision of the statute, as the terms plainly import, applies only to an existing road, and to one to be constructed and before construction. The railway company, however, has made no pretence that it is attempting to exercise the power conferred by this section of the statute.

It is not shown that any of the conditions exist to entitle it to exercise such power. No notice has been given, such as is required by the section; and without such notice the right of eminent domain cannot be exercised to effect such change in the original location. But it is too clear for argument that the provision of the statute was never intended to apply to a case like the present. It was certainly never intended to allow a change or deviation from a line of road out of the State to a new location within this State. The change of route here is from a line of road located in West Virginia, and without physical connection with that portion of the road located and constructed between Piedmont and the point of crossing the river below Keyser. There is no continuity of route in Maryland, and the change or deviation attempted is from the West Virginia road, and not from a Maryland road; and therefore the statute has no application to it.

It cannot be supposed for a moment that the legislature ever intended that a foreign railroad corporation, owning a road in an adjoining State, should have the power, by a change in the route of its railroad, to locate a route or any portion of its route within this State, and have the power to exercise the sovereign right of eminent domain, to secure its right of way. And if the legislature has not expressly granted such power by statute, as it surely has not, clearly no such power can be derived by implication, from the certificate of incorporation of a domestic railroad company, simply because the latter has made a connection with a railroad located in an adjoining State. It is a principle of universal recognition that the grants of franchises from the State are construed strictly, and most strictly in favor of the public and against the grantee. This is especially so in cases where it is claimed that the power of eminent domain has been delegated by the State. In such cases it must be clear, beyond reasonable doubt, that the right is possessed by the party attempting its exercise, and the power granted must be strictly pursued, because it is against common right. *Charles River Bridge v. Warren Bridge*, 11 Pet. 544, 545; *New York, etc., R. Co. v. Kip*, 46 N.Y. 546.

It was the obvious policy of the State, in passing the general railroad incorporation law of 1876, chap. 242, to encourage and facilitate the construction of railroads within our State. All railroads that may be constructed under the provisions of that law were intended to be exclusively under the control and jurisdiction of this State, and in no manner to be subject to the jurisdiction and

control of another State. Located as this road appears to be, this State will have but a very partial jurisdiction over it. It will be strictly an interstate road; and this State will neither be able to regulate the rates of tolls and charges upon it, nor exercise power for keeping it in repair and safe working condition for the protection of the public.

In my opinion, it never was the intention of the legislature that the provisions of the general railroad law should be applied in such a case as this. And without saying that so much of the road as may be constructed on the route prescribed in the certificate of incorporation is without warrant of law, I am clearly of opinion that that part of the proposed road which departs from the road in West Virginia below Keyser, and crosses the river into Maryland, runs through the Cookerly farm, and again crosses the river back into West Virginia, is not embraced or authorized by the certificate of incorporation, and consequently the right to exercise the power of eminent domain cannot be availed of by the corporation to secure the right of way for its road in the location of that part of it, and entertaining these views upon the subject, I am constrained to dissent from the construction of the certificate of incorporation, and the act of 1876, adopted by the majority of the court.

Location of the Termini of a Road.—See generally *Sims v. Brooklyn*, 4 Am. & Eng. R. R. Cas. 182; *Western Pa. R. Co.'s appeal*, 4 Ib. 191; *Chicago, etc., R. Co. v. Dunbar*, 5 Ib. 258; *People v. Brooklyn, etc., R. Co.*, 9 Ib. 454; *Baltimore & O. R. Co. v. Brydon*, 25 Ib. 287.

Rival Line Cannot Defeat Building of Road.—Where a railway has ascertained and located where its road shall be, it is not competent for another company to step in and take its route, agree with the owners, and occupy the land. The selection and location of route secures the title of the first company to that route, which it may carry to completion without dispossession by another. *Titusville, etc., R. Co. v. Warren & Venango R. Co.*, 12 Phila. (Penn.) 642; *Sioux City, etc., R. Co. v. Chicago, etc., R. Co.*, 25 Am. & Eng. R. R. Cas. 150.

BAILEY

v.

SWEENEY.

(Advance Case, New Hampshire. March 11, 1887.)

The fee in land taken for a railroad remains with the owner from whom the land was taken; and hence a railroad company has no right, as against the owner of the soil to give away hay, cut by its servants upon the land within the limits of its location.

ON defendant's exceptions. Judgment for plaintiff.

Trespass and trover for taking and carrying away three tons of hay. Facts found by the court.

The hay in question was cut by servants of the Sullivan County Railroad, upon land within the limits of its location, where its road crosses the plaintiff's farm. After it had been cut and before its removal, the corporation refused to allow the plaintiff to take it, but gave it to the defendant, one of their servants, who carried it away to his own use. The rights and title of the corporation in the land where the hay was cut were acquired by condemning and taking it for railroad purposes, by legal proceedings. Due precaution against fire, and the safe operation of the road, required that the grass and bushes growing by the side of the track should be cut and removed, or burned upon the ground. The court found for the plaintiff, and the defendant excepted.

Albin & Martin for defendant.

Ira Colby for plaintiff.

ALLEN, J.—The Sullivan County Railroad, whose servant the defendant is, and by whose direction and gift the grass was taken and used, assumes the defence of the case. The grass grew within the limits of the railroad, upon land that had been a part of the plaintiff's farm and taken for railroad purposes. The fee in the land taken for a railroad remains with the owner from whom the land was taken. The railroad has the possession and control of the land to use for constructing, maintaining, and operating a railroad. *Blake v. Rich*, 34 N. H. 282. If there was a reasonable necessity for the defendant in interest to remove the grass for the safety of passing trains, or as a precaution against the spread of fire, for the damages from which the railroad is liable, it was not necessary to sell or give away the grass; nor did its possession of the land for railroad purposes entitle it to appropriate the hay. *Chapin v. Sullivan R.*, 39 N. H. 564, 570; *Aldrich v. Drury*, 8 R. I. 554; *Taylor v. New York & L. B. R. Co.*, 38 N. J. L. 28; *Pierce Railroads*, 160.

If the safe operation of railroad and the protection of its business made it necessary to exclude the plaintiff from the land occupied by the road, there is nothing to show that the defendant could not have left the grass or placed it where the plaintiff could conveniently have taken it. *Blake v. Shephard*, 24 N. H. 208, 218. The servant of the railroad, by its direction, appropriated and used the grass for his own benefit; and this, not being necessary to, or having any connection with, the management of the road, was a conversion of the plaintiff's property by the defendant.

Judgment for the plaintiff.

CLARK, J., did not sit; the others concurred.

Interest Acquired by Railroad Company in Right of Way.—See *Vermilyea v. Chicago M. & St. P. R. Co.*, 23 Am. & Eng. R. R. Cas. 108; *Pittsburg & L. E. R. Co. v. Bruce*, 10 Ib. 1, and notes; *Leavenworth, etc., R. Co. v. Paul*, 10 Ib. 490; *Prather v. Western Un. Tel. Co.*, 14 Ib. 1, and notes; *Pierce v. Boston & L. R. Co.*, 27 Ib. 859–866, and notes; *Ross v. Pennsylvania R. Co.*, 27 Ib. 867.

COUGHLIN

v.

CHICAGO, IOWA AND KANSAS R. CO.

(*Advance Case, Kansas. May 6, 1887.*)

This is one of the cases contemplated by section 277 of the Code, in which the court could make an order to allow the jury to view the premises, and such an order is left by the statute to the discretion of the trial court.

ERROR to district court, Cloud county.

L. J. Crans for plaintiff in error.

F. W. Sturges and *W. W. Guthrie* for defendant in error.

SIMPSON, C.—This was an appeal to the district court of Cloud county from an award of commissioners appointed by the judge of the twelfth judicial district of the State, on the application of the defendant in error, to lay off a route for such railway in Cloud county, and to appraise the value of and assess the damages to land appropriated to its right of way, etc. The case was tried at the June term, 1885, to a jury. During the trial the court ordered that the jury be taken, in charge of the sheriff of the county, to the premises in question, for the purpose “of viewing the land in dispute.” The jury returned a verdict for the plaintiff in error, and assessed the amount of his recovery at the sum of \$598.25. There was a motion for a new trial by the plaintiff in error. It was overruled, and plaintiff in error brings the case here.

Two assignments of error only are discussed in the brief of counsel, and insisted on in this court, and both of these have been practically passed upon by the court. The first is that the findings of the jury and their verdict is not sustained by sufficient evidence as to the value of the land and the assessment of damages, they both being too small. The second is that the court erred in making the order allowing the jury to view the premises.

As to the first, we can only repeat what has been so often said, that the value of the land and the amount of the damages are questions peculiarly within the province of the jury to determine; and

if there is any evidence to sustain the verdict, and it has been approved by the trial court, it will not be disturbed in this court.

As to the second, this court has said in *Kansas Cent. R. Co. v. Allen*, 22 Kans. 285 (a similar case to this), "that the matter of viewing the premises is left by the statute to the discretion of the court." In that case it was held not to be error to refuse to allow the jury to "view." In this case it is held not to be error to order them to be taken to "view" in charge of an officer. We will not undertake to discuss the varying impressions that might be conveyed to the minds of the jurors by a view of the premises. We are bound to presume that the purpose of the legislature in allowing them to be taken to the locality is a wise one; and, in the absence of a proper showing, there is no means of determining whether the view resulted favorably or unfavorably to the plaintiff in error.

VIEW OF PREMISES BY JURY.

It is finally said that the court should have appointed some person for the purpose of "showing the place." The evident purpose of this clause in the section is to have some person appointed well acquainted with the locality. It is the mode of identification of the place. There may have been no necessity for it in this particular case, as many of the jurors, or the sheriff in charge of the jury, may have been familiar with the land appropriated and damaged. In any view of it that can be taken, we would be loath to hold that because the record does not show such a person was appointed, that it was such an error as would reverse the case. The better view is, the record being silent, we will presume that everything was done that the statute requires.

We find no error in the record that would justify reversal, and therefore recommend that the judgment of the district court of Cloud county be affirmed.

BY THE COURT.—It is so ordered; all the justices concurring.

Office of a View of the Premises by a Jury in Condemnation Proceedings.—The general rule is that the only office of a view of the premises by a jury in condemnation proceedings is to enable them to determine the weight of conflicting testimony respecting value and damage. *Seefeld v. Chicago, etc., R. Co.*, 67 Wis. 96; s. c., 27 Am. & Eng. R. R. Cas. 428; *Washburn v. Milwaukee, etc., R. Co.*, 59 Wis. 364; s. c., 20 Am. & Eng. R. R. Cas. 225; *Munkwitz v. Chicago, etc., R. Co.*, 64 Wis. 408; *Close v. Samm*, 27 Iowa, 503.

Instructions from which the jury might have understood that they might rest their verdict upon their knowledge of the land acquired by the view, even though their judgment was not sustained by the evidence, are held erroneous. *Seefeld v. Chicago, etc., R. Co.*, 67 Wis. 96; s. c., 27 Am. & Eng. R. R. Cas. 428.

The jury who have made a view of the premises in question may not disregard the evidence given in court and act upon their own observations on such view in making up their verdict. *Washburn v. Milwaukee, etc., R. Co.*, 59 Wis. 364; s. c., 20 Am. & Eng. R. R. Cas. 225.

In this case the court instructed the jury as follows: "You are to determine it (the compensation) from the whole evidence that has been given you in the case, from your view,—you take the view you make, you take your own knowledge, your own judgment, your own good sense." *Held*, that this instruction was erroneous. Lyon, J., said: "We understand that the object of a view is to acquaint the jury with the physical situation, condition, or surroundings of the thing viewed. What they see they know absolutely. . . . Hence, whatever the jury in each of these cases learned of the lands in question by the view, was available to enable them to determine the weight of conflicting testimony respecting value and damage, but no further. . . . The juries in these causes might reasonably have understood the instructions to be that they were to assess the compensation to which the respective plaintiffs were entitled, according to their own knowledge, judgment, and good sense, aided by the view, and that they might do so without regard to the testimony or in opposition thereto. We are satisfied, for the reasons before stated, that this was erroneous."

In *Iowa*, the object of a view of the premises has been held to be, to enable the jury to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of error, if any, could be afforded either party. *Close v. Samm*, 27 Iowa, 503; *Harrison v. The Iowa Midland R. Co.*, 36 Iowa, 323.

Impression Produced by View of the Premises Not Part of the Evidence.—The impression produced upon the minds of the jurors by a view of the premises does not constitute a part of the evidence in the cause, and cannot be considered in rendering their verdict. *Heady v. The Vevay, etc., Turnpike Co.*, 52 Ind. 117; *Jeffersonville, etc., R. Co. v. Bowen*, 40 Ind. 545, overruling *The Evansville, etc., R. Co. v. Cochran*, 10 Ind. 560; *Close v. Samm*, 27 Iowa, 503; *Harrison v. The Iowa Midland R. Co.*, 36 Iowa, 323.

Contrary Doctrine.—In *Illinois*, the jury have a right to view the premises and draw their own conclusions from their observations, as well as from other testimony offered in the case. *Mitchell v. The Illinois, etc., R. Co.*, 85 Ill. 566.

Such personal examination by the jury is in the nature of evidence to be considered by them, and a new trial will not be granted, even though the preponderance of the evidence presented in the record is clearly against so large an assessment as found by the jury, as the results of their personal investigation may have fully justified the verdict. *Chicago & Iowa R. Co. v. Hopkins*, 90 Ill. 316.

So in *Michigan*, it is held that the jury "are expected to use their own judgment and knowledge from a view of the premises, and their experience as freeholders, quite as much as the testimony of witnesses to matters of opinion." *Toledo, etc., R. Co. v. Dunlap*, 47 Mich. 456.

And in *Harper v. The Lexington, etc., R. Co.*, 2 Dana (Ky.), 325 it was held, that the jury may make their assessment upon their own view and need not decide on evidence furnished by the parties.

In *Penn. R. Co. v. Keiffer*, 22 Pa. St. 356, the court held that, while the viewers must determine for themselves by their own examinations, and upon their own judgments, yet they are not prohibited from examining witnesses to aid in their determination.

In a *Louisiana* case, it was held that a jury empanelled to estimate the value of property in condemnation proceedings should have a personal knowledge of the value of real estate in the vicinage, so as to rely upon their own opinion in forming their judgment, although it was proper that their own opinion should be aided, especially if they request it, by the opinions of wit-

nesses; that they were experts and should personally examine the premises in a body. *Remy v. 2d Municipality*, 12 La. Ann. 500. In this case, the court below refused to charge the jury as requested by counsel, that in assessing the amount to be paid to the plaintiffs they were to be guided by the testimony of the witnesses, but, on the contrary, charged that they were not bound to consider it, if not disposed to do so, "but might disregard it altogether, and decide on their own notion unaided by it." (See dissenting opinion of Voorhies, J.). The judgment, however, was affirmed.

Statutory Provisions, Kansas and Iowa.—In *Kansas* and *Iowa*, the matter of viewing the premises by the jury is left by statute to the discretion of the court. See *Kansas Central R. Co. v. Allen*, 22 Kan. 285; *King v. The Iowa Midland R. Co.*, 34 Iowa, 458.

The action of the court in exercising its discretion will not be disturbed where no abuse of the discretion appears. *King v. The Iowa Midland R. Co.*, 34 Iowa, 458. See also *Snow v. Boston & Maine R. Co.*, 65 Me. 230.

In *Illinois*, the statute makes it the duty of the court, at the request of either party, to permit the jury to go upon the land sought to be taken, and examine the same. They may examine the land either before or after the testimony is heard. *Galena, etc., R. Co. v. Haslam*, 73 Ill. 494.

Where the statute directs the commissioners to "proceed to view the premises and make the appraisal," their refusal to examine witnesses in reference to the value of the premises, is not sufficient ground for rejecting their report. *Lyman v. Burlington*, 22 Vt. 131. Where the commissioners are to judge from their own examination of the premises and have no power to swear or examine witnesses, if they do so they exceed their authority. *Van Wickle v. C. & A. R. Co.*, 14 N. J. Law (2 Greene), 162. See also *Stevens v. The Duck River Nav. Co.*, 1 Sneed (Tenn.), 237. Where the statute makes no provision for a view of the premises by the jury, it rests in the discretion of the court to grant or refuse it, and no exceptions will lie to the exercise of that discretion. *Snow v. Boston & Maine R. R.* 65 Me. 230. See note to 27 Am. & Eng. R. R. Cas. 431.

OREGON RAILWAY AND NAVIGATION Co.

v.

DAY.

(*Advance Case, Washington Territory. January 18, 1887.*)

The defendant company obtained an assignment of a contract by which the plaintiff agreed to convey a strip of land to another company, in consideration of its building its road between certain points. Previous to obtaining this assignment it had entered upon the land and commenced to construct its road. In an action by the land owner to recover compensation for the land taken, the company set up the above contract as a defence.

Held:

1. That having entered upon the land and built its road without reference to the agreement, the company could not claim any right thereunder to have the land conveyed, which it had already appropriated under the power of eminent domain; the owners right to compensation having occurred when the company entered upon the land.

2. That the land-owner was not estopped from claiming compensation by his previous contract; the company having acted independently, and not upon the faith of the contract, which was not assigned to it until after its road was commenced.

STATUTORY proceedings by Henry B. Day against the Oregon Railway & Navigation Co. to recover compensation for lands taken by the latter under its right of eminent domain. The opinion states the case.

TURNER, J.—The appellant, a railroad corporation, appropriated a strip of land, 100 feet wide, through the farm of appellee, FACTS. for the right of way of a railroad which it proposed to build thereon. The appellee, finding himself unable to agree with the company as to the compensation to be paid for said right of way, instituted proceedings before a justice of the peace to have his compensation determined agreeably to the provisions of chapter 188, Code. The case proceeded to a determination before said justice, and subsequently found its way into the district court, agreeably to the provisions of the chapter before referred to. In the latter court pleadings were filed as in an advisory civil action, and among other defences interposed by the appellant to the claim of the appellee was one averring a contract in writing, made by the appellee and wife with J. Lynch and W. E. Wilson, trustees of the Pataha R. Co., in which appellee and wife agreed to convey to the persons last named a strip of land 100 feet wide through said farm, for the purpose of constructing a railroad thereon. The answer averred due assignment of this contract to appellant, and prayed that appellee be enjoined from further prosecuting his action for damages, and that he be required to execute and deliver to appellant a conveyance as called for by said agreement. The issues made by this equitable defence were first tried by the district judge, sitting as chancellor, and, said issues having been found for the appellee, the cause proceeded to trial before the court and jury upon the question of damages, as in an action at law.

The only rulings of the court to which the appellant adverts in the brief of its counsel as error, are those made by the judge in the trial of the equitable defence; and as the case is here by appeal, pure and simple, none others could probably be urged. Coming, then, to the merits of the case, we do not deem it necessary to examine and pass upon the various findings of facts and conclusions of law made by the learned judge in the court below. These findings relate principally to the sealing and acknowledgment of the agreement pleaded in the answer of appellant, and to the validity of the assignment of said agreement to appellant. Admitting the validity of the agreement,—and we may say, in passing, that we see no necessity that an agreement to convey land should be sealed or acknowledged,—and admitting that the interest of the Pataha

R. Co. therein passed to the appellant by the assignment, the facts disclosed in the record present an insuperable obstacle to the equitable relief which the appellant seeks.

The appellant entered on the land of the appellee, and surveyed its right of way thereon about November 1, 1885, and early in November its graders were at work thereon. These facts are deposed of by the engineer of the company, and are not denied by any witness examined. Thereupon, the right of the appellee to compensation under the statute became fixed. Without deciding what right, if any, appellant took, by virtue of the contract assigned to it, on November 11, 1885, eleven days after it had appropriated the land, we are clear that it took no right thereunder to have conveyed to it by the appellee the land which it had already appropriated under the power of eminent domain.

AFTER ENTRY
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The consideration moving to the appellee for the agreement to convey his land was the building of a railroad through his premises, from some point to some point not disclosed by the agreement, but which, no doubt, the parties had in mind. Appellant having built its road without reference to that agreement, to now give it the benefit of the agreement as a defence to the suit for compensation would be to give it something for nothing. When it proposes to build a new line of road through the lands of appellee on the faith of this agreement, and shows that its line is one substantially like that which the original parties to the agreement had in mind,—something not shown of its present line,—it may have some rights under the agreement; it will then be time enough to determine what they are.

This view of the facts disposes of the contention of counsel for appellant, that, if the contract be one upon which specific performance may not be decreed, yet its execution by the appellee, and the construction by the appellant of its line of road partly on the faith of it, raise an equitable estoppel against the appellee to claim compensation. We have seen that the lands of appellee were appropriated before the appellant took any rights under the agreement. It did not, then, construct its road partly on the faith of said agreement, and no estoppel against the appellee arises. A different coloring might be given to this branch of the case if the testimony offered in the lower court and rejected were before us; but it is not before us, and appellant has not contended that it was prejudiced by the action of the lower court in respect to said testimony. Nor are we prepared to say that it was prejudiced.

The judgment of the lower court is affirmed.

GREENE, C.J., and HOYT, J., concur.

CENTRALIA AND CHESTER R. Co.

v.

RIXMAN.

(Advance Case, Illinois. June 20, 1887.)

Under the power granted by the Illinois Eminent Domain Act, judges of the county court have power to hear condemnation causes in vacation, including the power to set aside the verdict, and order a new trial in such a cause in vacation.

On the trial of a condemnation suit, the jury were instructed that "railroad companies are not required to fence their right of way for six months after the road is open for use, and the damages attending the keeping open the road for that length of time may properly be considered as an element of damages." *Held*, to be a correct statement of the rule of damages.

APPEAL from a judgment of Washington circuit court in favor of defendants in a proceeding instituted to condemn certain lands for railroad purposes. Affirmed.

The case is stated in the opinion.

W. S. Forman and *Daniel Hay* for appellant.

Charles T. Moore for appellees.

CRAIG, J.—This was a proceeding instituted by the Centralia & Chester R. Co. before the county judge of Washington county, in vacation, to condemn certain lands for right of way. It appears from the record that a jury was selected, the evidence heard, and a verdict returned into court fixing the damages for the lands taken; when, on motion of the land-owners, the verdict was set aside and a new trial granted by the court. After the county judge had granted a new trial, the parties by agreement transferred the cause to the circuit court, where, upon a second trial of the cause, appellees recovered the present judgment.

It is first insisted that, as the proceeding was instituted and a trial had in vacation before the county judge, he had no power to grant a new trial, and that the order vacating the verdict and granting a new trial was erroneous. Section 2 of the Eminent Domain Act provides that application to condemn property for a public use may be made to the judge of the circuit or county court, either in vacation or term time. Section 3 provides that, if the petition is presented in vacation, the judge shall note the day of presentation, and also note therein the day when he will hear the same. Section 5 provides that causes may be heard by such judges in vacation, as well as in term time. It is apparent, from

an examination of the statute, that the object intended to be accomplished by providing for a hearing in vacation was to guard against delay and secure a speedy trial, in which the rights of the parties might be settled and determined at once. But whether the proceeding may be in vacation or term time, it is a judicial proceeding, and the judge before whom the proceeding may be instituted has the same powers in vacation as he would have in term time.

Should an error be committed on the trial, it may be reversed on appeal or writ of error, or the judge, on motion for a new trial, may vacate the verdict and order a new trial to correct an error that may have occurred during the trial. The circuit or county courts are always open to entertain a petition to condemn property under the Eminent Domain Act, and when engaged in a trial in vacation they have and exercise the same judicial powers in vacation that they exercise when in session. *Bowman v. Venice & C. R. Co.*, 102 Ill. 459; s. c., 14 Am. & Eng. R. R. Cas. 338.

There is nothing in the statute which in the least indicates an intention to deprive the court of any of its powers which it exercises when in regular session, when engaged in the trial of a condemnation case in vacation.

The court refused appellant's sixth instruction, and the decision is claimed to be erroneous. The instruction was copied from what was said in *Jones v. Chicago & I. R. Co.*, 68 Ill. 384, in discussing an instruction which had been given by the circuit court on the trial of that cause. We fully concur in all that was said in the case cited, but it does not follow that all that was said in the case may be formulated into an instruction and given to the jury as a guide to lead them to a proper verdict in this case. The court gave, at the instance of appellant, in instruction No. 4, a verbatim copy of the instruction which was approved in the case cited, and that in substance embraced all that is contained in the refused instruction, and hence we see no ground upon which appellant can reasonably complain. Objection is also made to instruction No. 4 given for the defendant, which informed the jury that railroad companies were not required to fence their right of way for six months after the road is open for use, and the damages attending the keeping open the road for that length of time may properly be considered as an element of damages. This instruction is in harmony with *St. Louis & S. R. Co. v. Kirby*, 104 Ill. 347; s. c., 10 Am. & Eng. R. R. Cas. 214, where a similar one was approved.

It is also contended that the verdict is not sustained by the evidence, that the damages allowed are too large. There was evidence before the jury which fixed the damages at a less amount, and there was also evidence tending to prove that the damages were much more than the jury allowed. The jury heard all the evi-

dence and went upon and examined the lands taken, and we are not prepared to say, after reading all the evidence, that the verdict is so excessive as to authorize us to reverse on that ground alone.

The judgment will be affirmed.

Fences as an Element of Damage in Eminent Domain Proceedings.—It seems to be a result of the decisions upon the question of how far a railroad must compensate in eminent domain proceedings an owner of land for the destruction of his fencing, or the cost of rebuilding, that such injury is a proper element of damage. An examination of the authorities will show, however, that the question is somewhat complicated by the fence laws of the various States.

In Baltimore, etc., *R. Co. v. Lansing*, 52 Ind. 229, an instruction was held to be correct which directed the jury to consider as damages any additional amount of fencing necessary to a safe and proper use of the farm, or fields already enclosed, as the law does not impose on the company any obligation to fence their right of way, except so far as they may choose to do so for the protection of their own interests, the law simply imposing on them the obligation to pay for animals killed by them on their track, where it is not, but might be, securely fenced. "It is settled in this State that damages may be given for cutting fields into inconvenient shapes, destroying the conveniences and advantages of water for stock to a portion of the farm, and rendering an additional amount of fencing necessary to a safe and proper use thereof. *White Run Valley R. Co.*, 29 Ind. 536; *Montmorency G. R. Co. v. Rock*, 41 Ind. 263; *Montmorency G. R. Co. v. Stockton*, 43 Ind. 328; *City of Logansport v. McMillen*, 49 Ind. 493; *Grand Rapids, etc., R. Co. v. Horn*, 41 Ind. 479." See also Baltimore, etc., *R. Co. v. Johnson*, 59 Ind. 188, when in affirming this prior line of decisions the court held that, in an action for damages for stock killed through the lack of fences, the company could not demur that an allowance for fencing had been made when the land was condemned. Such an award leaves it to the option of the land-owner to fence his land, about which he may consult his own convenience. It is still the duty of the road to the public to keep the road fenced, and this duty to the public is the object of the law.

In Raleigh, etc., *R. Co. v. Wicker*, 74 N. Car. 220, the court held that every planter of cultivated land is required to keep it enclosed by a sufficient fence, and if the road makes necessary additional fencing to enclose the cleared land of the defendant, it is to be considered in estimating the damages to him from the road, citing *Freedle v. N. C. R. Co.*, 4 Jones (N. Car.), 89. But it further remarks: "As to the expense of fencing uncleared or uncultivated land, that should not be taken into consideration. The owner is not required by law to enclose such land, and it is not usually done. No damage in this respect is done to the land in its present condition, and any damage by reason of the necessity of fencing, in case the land shall at any future time be cleared, is too remote and uncertain to be capable of estimation. Moreover, the legislature has thought proper not to impose on railroads in this State the duty of fencing their lines of road. If, however, it should be held that every owner of wild land through which the road passes could recover as damages the cost of such fencing, a heavier burden would be imposed on the companies than if they were required to make the fences themselves. And as the fences would rarely be built, neither the company nor the public would receive the benefit which their erection is intended to secure." See also *Northeastern, etc., R. Co. v. Sineath*, 8 Rich. L. (So. Car.) 185; *First Parish v. Plymouth*, 8 Cush. (Mass.) 475.

In New York, etc., *R. Co. v. Stanley*, 35 N. J. Eq. 288; s. c., 10 Am. &

Eng. R. R. Cas. 345, it was held that the expense of making and maintaining additional fences made necessary by the construction of a railroad through the premises, should be included in damages to be awarded for the land, where the expense thereof falls upon the land-owner. See also *Readington v. Dilley*, 4 Zabr. (N. J.) 209.

In *Leavenworth, etc., R. Co. v. Paul*, 28 Kan. 816; s. c., 10 A. & Eng. R. R. Cas. 490, the court remarked: "We think that the cost of constructing a fence, if the construction of a fence was reasonable and proper under the circumstances in which the defendant's road ran through the farm, was a proper matter for the consideration of the jury. The plaintiff had testified that he had already constructed a fence along the line of the right of way, and in view of the manner in which, as he states, the road ran through his orchard and other parts of his farm, we think the building of a fence was reasonable and proper." It was accordingly held, that the allowance of damages for the cost of constructing a fence should be made. See also *St. Louis, etc., R. Co. v. Kirby*, 104 Ill. 347; s. c., 10 Am. & Eng. R. R. Cas. 214; *St. Louis, etc., R. Co. v. Anderson*, 39 Ark. 167; s. c., 17 Am. & Eng. R. R. Cas. 97; *Houston, etc., R. Co. v. Adams (Texas)*, 20 Am. & Eng. R. R. Cas. 246; *Pittsburg, etc., R. Co. v. McCloskey*, 23 Am. & Eng. R. R. Cas. 86; *Louisville, etc., R. Co. v. Sumner*, 24 Am. & Eng. R. R. Cas. 641; *California, etc., R. Co. v. Southern Pacific R. Co.*, 20 Am. & Eng. R. R. Cas. 309; *St. Louis, etc., R. Co. v. Walbrink (Ark.)*, 26 Am. & Eng. R. R. Cas. 604; *Winona v. St. Peter, etc., R. Co.*, 10 Minn. 267; *Alton, etc., R. Co. v. Baugh*, 14 Ill. 211; *Ionica, etc., R. Co. v. Unsicker*, 22 Ill. 221; *Vandegrift v. Delaware, etc., R. Co.*, 2 Houst. (Del.) 287; *Greenville, etc., R. Co. v. Partlow*, 5 Rich. L. (So. Car.) 428; *Carpenter, etc., R. Co. v. Sims*, 3 Leigh (Va.), 675; *Danville, etc., R. Co. v. Gearhart*, 81* Pa. St. 260; *Watson v. Pittsburg, etc., R. Co.*, 37 Pa. St. 469; *East Pennsylvania, etc., R. Co. v. Hiester*, 40 Pa. St. 53; *Montour, R. Co. v. Scott*, 11 Weekly Notes Cas. (Pa.) 51; *Butte County v. Boydston*, 64 Cal. 110.

In *Delaware, etc., R. Co. v. Burson*, 61 Pa. St. 360, the court instructed the jury that they could not allow as damages the cost of fencing, but that it was to be considered in estimating the value of the farm, and how much the burden of fencing would detract from it. "That would undoubtedly be an inquiry in comparing advantages and disadvantages. It was a tangible thing, capable of some sort of estimate, and might be considered in the aspect in which it was presented by the learned judge. A purchaser would be very apt to claim something on this score if proposing to buy." This case has been since affirmed. *Pennsylvania, etc., R. Co. v. Bunnell*, 81 Pa. St. 414; *Pittsburg, etc., R. Co. v. McCloskey*, 23 Am. & Eng. R. R. Cas. 86.

In *St. Louis, etc., R. Co. v. Mitchell*, 47 Ill. 165, it was held that the compensation should include the cost of maintaining the fence.

The difficulty of estimating the cost of maintaining fences has led some courts to deny the doctrine that compensation should include the cost of maintaining fences, and it has been held that the changes rendered necessary should be compensated, but not the cost of maintenance for an indefinite period. *Evansville, etc., R. Co. v. Fitzpatrick*, 10 Ind. 120; *Rock Island, etc., R. Co. v. Lynch*, 23 Ill. 645.

In *Holton v. Butler*, 23 Iowa, 557, it was held that the expense of removing and resetting a fence which the owner had built upon the right of way, when the damages for taking the right of way had already been assessed, could not be allowed to the owner.

Effect of Fence Laws.—The decisions as set forth in the cases cited, and those hereinafter mentioned, will show that the views of the courts are not in entire harmony as to the effect of the fence laws of the various States.

In *Houston, etc., R. Co. v. Adams (Texas)*, 20 Am. & Eng. R. R. Cas. 246, it was held, that injuries to crops, orchards, pastures, and fences, being

such as result from tearing down of plaintiff's fence at the time the railroad entered the land, and from the failure to so fence and guard its way where it entered and left the land that animals could not enter and destroy plaintiff's property, are proper elements of damage.

"When a railway seeks the right of way through inclosed lands through condemnation, the cost of such fences as will necessarily have to be built to enable the owner to use his land after the railway is built will be taken into consideration in estimating the damage, but where fences will not have to be built, and the land will be fully inclosed without additional fences, if the right of way at the entrance be fenced, then this does not enter into the estimate, but the law makes it the duty of the railway company to keep this part of the enclosure safe, and on this the owner of the land does and may rely. In cases in which the right of way is acquired by agreement, with or without compensation paid, other than such benefits as may result from the construction and operation of the road, the same things may be supposed to influence the parties, and to form the consideration to the contract, as may be taken into consideration by a jury, or board, in estimating damages. In either case the parties rely upon a compliance by the railway company with the plain provisions of law, which in the one case, as in the other, will render necessary for the protection of the land-owner the erection of fences on each side of the way through the entire enclosure. The parties contract, in view of an implied promise on the part of the railway company that it will do what the law requires it to do, and not in expectation that the railway will violate its duty. That the land-owner might recover the cost of erecting the necessary fences is no answer to the breach of contract by which the railroad promised to render the erection of such fences unnecessary."

In Alabama, etc., R. Co. v. Burkett, 46 Ala. 569, the court below had charged the jury that, in estimating the damages, they might take into consideration that more fencing was required and that the plaintiff's stock was liable to be killed. In construing this instruction the court remarked: "Both these were injuries that might not occur. It has not been found necessary to fence railroads that pass through enclosures or farms. Those additional fences are usually obviated by the simple contrivance of a pit, when the roadway crosses a fence or enclosure around a lot or farm. And it may also happen that no stock, the property of the plaintiff, may ever be killed by the cars on the railroad. And if it should be, there is another mode presented to recover damages for the injury thus occasioned. Rev. Code, §§ 1399, 1400, 1401, 1406; Nashville, etc., R. Co. v. Comans, 45 Ala. 437; Besides, if damages for such prospective killing and injury of stock should be allowed to be recovered in this way, and then again as the above-cited statute prescribes, this would be a double satisfaction for the same injury, which would not be a just compensation for the property injured. A double satisfaction is not allowed. McLane v. Miller, 10 Ala. 856. Moreover, such damages would be too remote. Sedgw. on Dam. pp. 57, 58, 4th ed. It is by no means certain that they would ever be occasioned by the railroad."

DAVIS

v.

TITUSVILLE AND OIL CITY R. Co.

(Advance Case, Pennsylvania. November 1, 1886.)

When there is a question of location between two rival railway companies, that which has first made a survey and staked out a centre line is entitled to a priority of right.

A railway company, without objection from the owner, in 1870, entered upon land, located its line, and commenced the construction of its roadway; after the lapse of some time, the work of construction ceased for want of funds; in 1880 it was recommenced; no agreement had been entered into as to the damages, nor had any legal proceedings been commenced to adjust them; later a bond was filed. *Held*, the title to the right of way vested by virtue of the original occupation, and tenants leasing the land and operating upon it for oil, after the year 1870, were not entitled to damages.

The property and franchises of a railway company that had commenced the construction of its road were by judicial sale vested in A. *Held*, the deed to A. for the same was within the recording acts.

ERROR to the court of common pleas of Venango county.

This was an appeal from the report of reviewers to assess damages; the verdict was for defendant.

M. J. Heywang for plaintiff in error.

Hancock & Glenn for defendant in error.

CLARK, J.—In the determination of this case we must assume that the defendant's road was, by the Titusville & Petroleum Centre R. Co., permanently located in the year 1870, FACTS. on the same ground upon which it has since been constructed; and that the grading of this part of it was done in the years 1870 and 1871. These questions of fact were distinctly submitted to the jury, and there was abundance of evidence to justify the submission. The verdict, therefore, establishes these facts beyond all controversy. It is plain, too, that the entry of the company, for the location and construction of the road, was without objection on part of the Caldwell Oil Company, the owner in fee of the premises. There is no evidence whatever showing, or tending to show, any objection on part of the Caldwell Oil Co. The only controversy was with the Warren & Venango R. Co., who it appears claimed the same location, and to that company the Caldwell Oil Co. had released their right of way. Mr. Chapin, the superintendent, said they had got their pay, and all they wanted was a railroad.

On a question of location between two rival companies, that which had first made a survey and staked out a centre-line is entitled to a priority of right. *Wilkesbarre & Philadelphia R. Co. v. Danville & Hazleton R. Co.*, 29 Leg. Int. 373; *West End Passenger R. Co. v. Philadelphia City Passenger R. Co.*, 30 Id. 257; *New Brighton & New Castle R. Co.'s Appeal*, 105 Penn. St. 13. Upon this ground, after a somewhat protracted litigation, it was determined, in 1874, that the Titusville & Petroleum Co. was entitled to the location, and the Warren & Venango Co. were finally enjoined from any further interferences. *Titusville & Petroleum Co. v. Warren & Venango Co.*, Leg. Gaz. 117.

QUESTION OF LOCATION BETWEEN TWO RIVAL COMPANIES.

Pending this litigation, the work of construction ceased, and it was not afterwards resumed for several years. In the mean time the property and franchises of the Titusville & Petroleum Co. were upon execution process sold, at a public judicial sale; the Titusville & Oil City R. Co. succeeded to their rights, and the latter completed the construction and equipment of the road.

FURTHER FACTS.

The plaintiff, Henry R. Davis, and Mr. Chapin, who was at the time superintendent of the Caldwell Oil Co., in the year 1871 commenced to operate for oil on the ground covered by this lease; by what authority from the company their operations were conducted is not shown; it is conceded, however, that Davis has been personally engaged in the production of oil on these premises ever since, and perhaps before, the year 1871; he says that he has been so engaged since 1868. It is clear, then, that he had actual personal knowledge of the location and grading of the defendant's road; in 1871, when he says he and Chapin became partners, the road had not only been located, but was, in fact, wholly or partially graded. The work of construction after this time was, in consequence of the litigation, and perhaps of the pecuniary embarrassment of the company, long delayed, but there was no evidence of abandonment. There was enough, at all events, to put an ordinarily prudent man upon inquiry; it cannot be said that Davis, in taking a lease in 1876, could be regarded as a purchaser without notice. Indeed, by whatever arrangement or agreement with the Caldwell Oil Co. Davis may have conducted his operations, it is not shown that he has any written evidence of title until the 14th of July 1882, and at that time the railroad was wholly completed, fully equipped, and in actual operation. It is true that the lease of 14th of July, 1882, was written to take effect from the year 1876, but it is plain that under the pre-existing parol agreement he was from 1876 to 1882 but a tenant at will, by the express terms of the statute.

The location of the road in 1870, as well as the partial construction in 1870 and 1871, and the completion of it in 1880, was with-

out any agreement as to damages, and without any previous legal proceedings in adjustment thereof. No bond has been either tendered or filed, but as the entry of the company was without objection of the owner, no trespass was committed. Upon the subsequent filing of the bond in 1880, therefore, the title to the right of way vested, not through the proceeding initiated by the bond, but by the original occupation of the land, under the charter, for the purposes of the road. Thus in *Lawrence's Appeal*, 78 Penn. St. 365, a railroad company constructed their road without agreement as to damages, and without any legal proceedings, but also without objection by the owner; subsequently proceedings to assess damages were commenced, but the case was compromised and the damages released. After the construction of the road, but before the compromise, the tract was leased for mining purposes. In the decision of that case this court said: "The railroad company had actually appropriated the land, and built and used its railway, long before any title by lease of the coal mines had vested in the defendants. This is admitted in the answer. The owner of the land made no objection to this appropriation, but after a proceeding to assess the damages had been prosecuted, finally compromised, and released. The title of the railroad company came not through this proceeding, but by its original entry and appropriation without objection. The release operated not by way of an original conveyance, but by way of a discharge for the damages incurred by the entry and construction of the railway. It is clear, therefore, that when the defendants obtained their lease, they took it subject to the previous easement—the right of way of the railroad company over the surface. The railroad was then in lawful existence and use. The owners made no defence to the right of the railroad company to appropriate the land, and these tenants cannot now set up a defence which they waived if they had any."

In the case we are now considering the road was located and partially constructed in 1870, and that was an appropriation of the land. "Where a railroad has been located, the land has been taken and appropriated for public use; the right of the land-owner to sue for his damages is complete, and he may recover all which may be caused by the location, and by the subsequent construction; the damages cannot be severed; security for one is therefore security for all. *Neal v. Pittsburg & Connellsville R. Co.*, 2 Grant Cas. 137." *Wadhams v. Lock & Bloomsburg R. Co.*, 42 Penn. St. 303. The permanent location of a railroad is an appropriation of the ground, and vests a right to the damages assessed. *Beale v. Pennsylvania R. Co.*, 86 Penn. St. 509—and the owner of land at the time of the actual location is the party entitled to the damages.

In the case now under consideration the jury has found that the road was permanently located and indeed partly constructed over

the premises in question in the year 1870, and this, being without objection of the owner, under all the authorities, was an appropriation of the land for the purposes of the road. The Caldwell Oil Co. was then the owner of this land in fee; the plaintiff had no title whatever, and we cannot see how he can have any claim for damages. A proceeding is now pending for assessment of the damages of the Caldwell Oil Co., and the whole question will be there adjudicated, as of the date of the appropriation of the land.

This disposes of the fourth, sixth, seventh, eighth, and ninth assignments of error, which involve the main and only important question in the cause.

The remaining assignments relate chiefly to the admission of evidence, and are wholly without merit. The cross-examination of Charles Paiste, so far as it is related to his former estimate of the value, was clearly competent, and that was the extent to which the examination was allowed to proceed. The property and franchises of the Titusville & Petroleum Centre Co. having been transferred by a judicial sale to D. P. Corwin, or to John Scott, the record of their respective deeds was certainly admissible in evidence to establish the transmission of their title in the railroad property to the newly organized company. The franchises of the company were derived through its charter, and the record of the deeds was admissible to establish their right of way over lands appropriated by their predecessors in title; as a right of way may be said to be an interest in land, the deeds are within the recording acts.

We discover no error in this record, and the judgment is affirmed.

Owner at Time Land was Taken Alone Entitled to Damages.—Mr. Mills in his work on Eminent Domain, chap. 8, § 66, says: "A claim of damages and a title to land may be distinct. Damages for taking and injury to land belong to the owner at the time of the injury, and do not pass to a subsequent vendee. The owner alone can take advantage of a claim for damages, and if he does not claim his subsequent vendee cannot." In *Toledo W. & N. R. Co.*, 72 Ill., 155, the court say: "The appellee did not own the lands when the company graded and constructed its road at that point. Whatever damage was done by reason of the grading of the roadbed was to his grantor. In the absence of all evidence on that subject it may be presumed the company adjusted the damages with him. If the former owner did not complain certainly his grantee cannot. He purchased the land with the incumbrance of the railroad embankment upon it. It was open and visible, and he could see exactly how the form was affected by the construction of the railroad." This is the position taken by the authorities unanimously. *Dixon v. B. & P. R. Co.*, 3 Am. & Eng. R. R. Cas. 201; *Wabash, St. Louis & P. R. Co. v. McDougal*, 27 Ib. 386; *Chicago & East. Ill. R. Co.*, 27 Ib. 415; *Kuntz v. McCune*, 22 Wis. 628; *Memberg v. McKeen*, 3 Cent. Rep. 383; *Lewis v. Wilmington & M. R. Co.*, 11 Rich. (S. Car.) 91; *Rand v. Town of Townshend*, 26 Vt. 690; 1 *Redfield on Railroads*, 350; *Drury v. Midland R. Co.*, 127 Mass. 571.

When the Vendee is Entitled to Damages.—The above cases presuppose that the owner, at the time the entry made or the land taken, had entered into no obligation to convey the land. Thus, one who had agreed to purchase land refused to complete the contract; the seller brought a suit in equity for a specific performance thereof; a decree was rendered against the purchaser for the full contract price, which he paid, and the seller gave him a deed of the land, of the date of the contract. While the suit was pending, part of the land was taken for a railroad. *Held*, that the purchaser could maintain a petition in his own name against the railroad company to recover damages for the land taken. *Pinkerton v. Boston & A. R. Co.*, 109 Mass. 529. So, the owner of an estate in fee, and a person to whom he has given a bond for a deed on the fulfilment of certain conditions, may both join in a petition for damages to such estate caused by taking it for a railroad, although the condition of the bond is not then performed. In such case the railroad company cannot object that the damages are awarded in a gross sum, and not apportioned to each petitioner. *Proprietors of Locks & Canals v. Nashua & Lowell R. Co.*, 10 Cush. (Mass.) 385.

In *St. Louis, L. & D. R. Co. v. Wilder*, 17 Kan. 289, it was held that where a person was in possession of land and held a title bond conditioned for the execution of a deed to him on payment of the purchase-money, he was entitled to damages for the taking.

CEDAR RAPIDS, IOWA FALLS AND NORTHWESTERN R. Co.

v.

RAYMOND *et al.*

(*Advance Case, Minnesota. July 14, 1887.*)

Upon the trial of a cause for the assessment of damages for the taking of land for a railway, the fact of the existence of a highway upon the land, being a collateral matter, may be shown by oral evidence.

The general statute law relating to such condemnation proceedings contemplates that such rights of private use of the land taken as are of a nature to interfere with the operation of the railroad, shall be determined and defined in the condemnation proceedings, and the land-owner has not a reserved right of private crossing unless so defined. Compensation to the land-owner is to be assessed accordingly.

Evidence that the land, a part only of which is taken, is so near to the railroad depot and stock-yards as to show that the land will be subject to extraordinary use on that account, is admissible.

As affecting the market value of the property, the fact may be shown that the railroad increases the rate of insurance upon buildings already erected.

Amount of damages awarded, considered as justified by the evidence.

APPEAL from district court, Rock county.

Daniel Rohrer for Cedar Rapids, I. F. & N. W. R. Co., appellants.

E. H. Canfield and *C. C. Willson* for Raymond and another, respondents.

DICKINSON, J.—This appellant is a railway corporation of Iowa, having authority (see Gen. St. 1878, c. 34, § 106) to extend its road into this State, and for that purpose to exercise the power of eminent domain conferred upon like domestic corporations by our general laws. The corporation instituted proceedings by petition for the condemnation, for its right of way, of a strip of land 100 feet wide off the west side of a 20-acre tract owned by the respondents. Upon the trial in the district court upon appeal from the award of commissioners, the land-owner was allowed to testify to the existence of a public-travelled highway on the west side of this land. This was not error, although there may have been record evidence of the existence of the highway; the fact thus sought to be shown being of a collateral nature. Evidence was presented that there were no other highways touching this land, and that the only public way by which the land was accessible was this public highway on the west, which, after the construction of the railroad, could only be reached from this land by crossing the railroad track. The petition of the company for condemnation did not restrict the use to be made by it of the land condemned, or provide for the reservation to the land-owner of any right to cross the track, nor did the order of the court for the appointment of commissioners make any such reservation to the land-owner. The court instructed the jury that they should assess the damages upon the basis that the land-owner would have no right of crossing over the track. The correctness of this instruction is the principal point in the case.

The general law under which these proceedings were had provides for a petition to the district court by the corporation, describing "the lands, property, and estate which it will be necessary to take, use," etc., and praying the appointment of commissioners to assess the compensation. Provision is made for notice and hearing upon the petition. "The court may also, in its discretion, in and by said order [appointing commissioners], limit the easement to be acquired by reserving to the land-owner such rights and privileges therein, and to be defined in such order, as shall not be incompatible with the use for which the land is sought to be appropriated; such rights and privileges to be exercised and enjoyed in such manner, at all times, as not to injure or interfere with the railway track or structures or other improvement for which the land is to be appropriated, or the free and legitimate use of the same for the purpose of such railway." Gen. Laws 1879, c. 35.

The charters of many of the railroads in this State have made express provision in respect to farm crossings. The general law to which we have referred does not. The railroad company, in its petition, might claim, and, if its claim were allowed by the court, it might secure a right of way,

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NATURE OF RIGHT OF WAY TO BE ACQUIRED.

in its nature exclusive, excluding the land-owner from any private right of crossing which could interfere with the railroad use, such as a private crossing at grade. In some localities such an exclusive right would be expedient, and perhaps necessary. On the other hand, the company might not require such an exclusive right. Its proposed uses might be such that there could be safely left to the land-owner a private right of way over the railroad; and in the condemnation proceedings it might properly seek to require the more limited easement. But the nature of the right of way to be acquired, whether or not it is to be qualified by any remaining right of the land-owner to use the track as a private way, is an important question in the proceedings for condemnation, both as respects the compensation to be awarded for the taking, and as affecting the subsequent rights of the parties to the use of the land. It is for the railroad company seeking the appropriation of lands to its use, to indicate in its petition the nature and extent of the easement proposed to be taken.

The easement thus sought to be acquired may be limited by the order appointing commissioners to assess compensation "by reserving to the land-owner such rights and privileges therein, and to be defined in such order, as shall not be incompatible," etc. We are of the opinion that this statute contemplates that the "reserved" rights of the land-owner, such as that here in question, which are of a nature to interfere with the possession and operation of the railroad, shall be determined and defined in the condemnation proceedings. As to private crossings over the road, there is not to be left, as a subject of future controversy, the question whether, in a particular case, they are necessary, and whether they can be allowed without endangering public travel, or interfering with the uses which, for reasons affecting the public, are conferred upon the railroad company. Upon this construction of this statute, the charge of the court was right, as was also its refusal to give the appellant's requested instruction. There being no reserved right of crossing, the measure of compensation could not be affected by the fact that the company had put in a crossing at the request of the land-owner; the right to use it being dependent upon the will of the company. *Ham v. City of Salem*, 100 Mass. 350; *Drury v. Midland R. Co.*, 127 Mass. 571.

"RESERVED"
RIGHTS OF LAND-
OWNER — PRI-
VATE CROSSING,
ETC.

Evidence was admissible of the location of the railway station 200 feet south of this land, and of its stock-yards just north of the land; for that would tend to show the extent of the use to which the land in question would be subjected. The injury caused by the taking of land in close proximity to a station might well be deemed to be greater than if it were at a considerable distance from it, because of the more frequent passing of trains and locomotives to be expected about

NEARNESS TO
STATION AND
STOCK-YARDS.

railway stations. Such evidence, however, should only be received where the situation is such as to render it reasonably certain that the land will in fact be subjected to such extraordinary use.

Evidence was introduced on the part of the land-owner of the market value of the buildings upon the premises, and that the rate of insurance would be increased at least 1 per cent a year by the proximity of the road. The evidence

EVIDENCE OF
MARKET VALUE.

was admissible tending to show diminution in the value of the property. *Colvill v. St. Paul & C. R. Co.*, 19 Minn. 283 (Gil. 240); *Curtis v. St. Paul, S. & T. F. R. Co.*, 20 Minn. 28 (Gil. 19). The court properly instructed the jury that this element was only to be considered as affecting, if it did do so, the market value of the land. *Curtis v. St. Paul, S. & T. F. R. Co.*, *supra*; *County of Blue Earth v. St. Paul & S. C. R. Co.*, 28 Minn. 503; *s.c.* 10 Am. & Eng. R.R. Cas. 209.

The evidence was sufficient to justify the amount of compensation awarded by the jury. The fact that it appeared upon cross-examination that some of the several witnesses whose opinions as to the amount of damages had been given based their estimate in part upon improper considerations—as the damage resulting from the proximity of the stock-yard to this land—does not leave the verdict without reasonable and sufficient evidence to support it.

There were some assignments of error to which we have not deemed it necessary to particularly refer. We think they are not sustainable. The order overruling a new trial is affirmed.

BERRY, J., because of sickness, took no part in this decision.

MITCHELL, J.—I am not prepared to say that evidence of the location of the railway depot and stock-yards was competent for any such purpose as indicated in the foregoing opinion, but I do not think that the evidence in fact admitted on that point could have prejudiced the appellant. I therefore concur in the result.

Private Crossings, Consideration of, in Estimating Damages in Condemnation Proceedings.—The award and payment of damages does not preclude the former owner from compelling company to do their duty as to. *Jones v. Seligman*, 3 Am. & Eng. R. R. Cas. 236; and when a party is entitled to a safe crossing, the jury cannot consider in estimating damages whether or not crossing is properly constructed. *Republican Valley R. Co. v. Linn*, 14 Am. & Eng. R. R. Cas. 198. A party is entitled to damages for failure of company to construct crossings as required by commissioners. *Kittell v. Missisquoi R. Co.*, 20 Ib. 165. When map and profile show intent of company to construct farm crossings, the jury should take the fact into account that the company is bound to construct them.

Risk from Fire may be Considered in Estimating Damages.—See *Setzler v. Pennsylvania, etc., R. Co.*, and note, 24 Am. & Eng. R. R. Cas. 280-287; *Kansas City, etc., R. Co. v. Kregelgo*, and note, 20 Ib. 241-246.

SENNOTT

v.

ST. JOHNSBURY, ETC., R. CO. AND LAMOILLE VALLEY R. CO.

(Advance Case, Vermont. May 28, 1887.)

An equitable owner of land who becomes the legal owner has a lien for damages on land taken by a railroad company, enforceable against a company now in possession which succeeded to the rights of the company that first took the land; but the measure of damages is not an agreement made between the owner and the first company, as there was no such privity between the two companies as would bind the last one, but in this case it is the value of the land actually taken, as the orator was not the owner of the lands contiguous to that taken when the present company took possession.

Interest is recoverable from the time the last company took possession, instead of the time the orator acquired the legal title.

BILL in chancery. Heard on the pleadings and a special master's report, September term, 1885; Franklin county, ROYCE, Chancellor. Decree *pro forma*, that unless the defendant pay to the orator the sum of \$431.20 and interest thereon from the 18th day of June, 1883, and the orator's costs, on or before the first day of June, 1886, that the defendants be perpetually enjoined from running and operating their railroad over the farm in question and from interfering in any manner with the exclusive occupancy and possession thereof by the orator. Appeal by the orator.

The orator owned a farm of four hundred and fifty acres in Bakersfield, Franklin county. The L.V. Co. located its road through said farm and commenced its construction, completing it in 1876, and operated it until 1880. The holders of the mortgage bonds foreclosed the mortgage at December term, 1879, of Caledonia county court, court of chancery, and it organized under the name of the St. J. Co., and went into operation of the road on the 1st day of July, 1880. The orator's farm was mortgaged for a large sum prior to the survey of the railroad, and in 1876 he sold to W. M. Sennott a portion of the farm, it being that through which the survey of the railroad extended, but reserved all the land embraced in the survey, not exceeding six acres. In 1883 this land was re-deeded by W. M. Sennott to the orator, and Burton, the mortgagee, of the farm, at the same time—June 18, 1883—deeded the farm to the orator, taking a mortgage back. In 1878 the orator was adjudged a bankrupt, and in pursuance to an agreement with the orator, said Burton purchased the interest which the bankrupt estate had in the farm and held it as security till June 18. Said

Burton signed a writing by which he agreed and directed that the said land damages be decreed and paid to the orator.

Edson and Cross & Start for orator.

Burt & Burt for defendants.

ROWELL, J.—The orator seeks to stand as against the St. Johnsbury & Lake Champlain Co. on his agreement of December 6, 1875, with the Lamoille Valley Co., whereby his land damages were fixed at \$678, with interest thereafter. But the St. Johnsbury Co. was not a party to that agreement, and following *Adams v. Railroad*, 57 Vt. 240, the agreement cannot be regarded as binding on that company on the ground of privity between it and the Valley Co., for it did not succeed to the property in a way to establish such privity.

Nor is the agreement binding on the St. Johnsbury Co. by reason of the statute, as a judgment would have been; for in *Bridgman v. Railroad*, 58 Vt. 198, a judgment against the Valley Co. was held binding on the St. Johnsbury Co. solely by force of the statute, and not at all on the ground of privity. But the statute has no effect upon the binding quality of agreements in this behalf, but leaves them to stand on general principles.

The St. Johnsbury Co. is liable, therefore, only by reason of its own taking; but it is liable for the land actually taken as of the time when it first took it, for the orator was then the equitable owner of it and has since become the legal owner. But it is not liable to him for damage to the land contiguous to the land taken, for he was not the owner of it at the time of taking.

The decree is modified so as to give the orator interest on the sum decreed from July 1, 1880, when the St. Johnsbury Co. first took possession, instead of from June 18, 1883, when the orator acquired legal title from Burton; but in all other respects the decree is affirmed, and the cause remanded.

TAFT, J., dissents.

Interest on Damages Assessed in Eminent Domain Proceedings.—Text-writers have not given this subject much attention. The decisions upon it are based upon clear and satisfactory reasoning, and require that a company condemning property and appealing from the assessment of damages, or delaying the payment thereof, shall compensate the owner by the addition of interest upon the damages, for the loss and inconvenience the latter suffers by being deprived of both property and money from the time of taking possession, the time possession might have been taken, or the time when the award determines the amount of the company's liability.

The jury are authorized by law to include in their assessment of damages an allowance of interest from the time the land was taken. *Edmands v. Boston*, 108 Mass. 535; *Kidder v. Oxford*, 116 Mass. 165.

In *Warren v. St. Paul, etc., R. Co.*, 21 Minn. 424, it is held that as a general rule interest on the damages should be allowed on appeal. See also *Whitacre v. St. Paul, etc., R. Co.*, 24 Minn. 811.

In Delaware, etc., *R. Co. v. Burson*, 61 Pa. St. 369, the court observes: "Nor was there error in charging the jury to allow interest. If the plaintiff was entitled to compensation by reason of her property being taken at a particular time, she was certainly entitled to interest as a compensation for its wrongful detention. The company as well as the plaintiff could have had the damages assessed as soon as they pleased after locating the road, and it was no reason for withholding compensation that its amount was unknown or unascertained. As the company was the party to pay, it ought to have had the amount ascertained, and paid it; failing to do so, it has no right to complain at having to meet an accident of the delay in the shape of interest."

In *In re Pigott*, L. R. 18 Chan. Div. 146, under the land clauses consolidation act, 1845, the rules applicable to vendor and purchaser were applied between a land-owner and a railroad company. The latter was charged with interest upon the purchase-money, where the company not being in possession delayed paying the purchase-money, it being held that they were liable for interest not from the date of the award, but from the time they might prudently have taken possession; that is, when a good title was shown.

Interest from Date of the Award of Damages.—In *Metler v. Easton, etc.*, R. Co., 37 N. J. Law, 222, the court observed: "Interest from the date of the award of the commissioners should, as a general rule, be allowed, not strictly as damages, but as an equitable mode of compensating the owner for the necessary delay in ultimately ascertaining the amount he is entitled to be paid. The general rule as to the allowance of interest is liable to be controlled by the circumstances of each case. If the owner has had the profitable use of the premises, or has received rents pending the appeal, these circumstances should be taken into account, and interest abated accordingly."

See generally in confirmation of the rule above stated: *Old Colony, etc., R. Co. v. Miller*, 125 Mass. 1; *Bangor, etc., R. Co. v. McComb*, 60 Me. 291; *Hartshorn v. Burlington, etc.*, R. Co. 3 N. W. Rep. 648; 1 Suth. on Damages, 604; 3 Suth. on Dam. 465 *et seq.*; *Selma, etc., R. Co. v. Gammage*, 63 Ga. 604; s. c., 1 Am. & Eng. R. R. Cas. 41; *Sioux City, etc., R. Co. v. Brown* (Nebraska, 1882), 10 Am. & Eng. R. R. Cas. 406; *West v. Milwaukee, etc., R. Co.*, 56 Wis. 318; s. c., 10 Am. & Eng. R. R. Cas. 415; *East Tennessee, etc., R. Co. v. Burnett*, 11 Lea (Tenn.), 525; s. c. 14 Am. & Eng. R. R. Cas. 370; *Noble v. Des Moines, etc., R. Co.* (Iowa, 1883), 14 Am. & Eng. R. R. Cas. 208; *Hollingsworth v. Des Moines, etc., R. Co.* (Iowa, 1884), 17 Am. & Eng. R. R. Cas. 113; *Hays v. Chicago, etc., R. Co.* (Iowa, 1884), 17 Am. & Eng. R. R. Cas. 110; *Kittell v. Missisquoi R. Co.*, 55 Vt. 96; s. c. 20 Am. & Eng. R. R. Cas. 165; *Cohen v. St. Louis, etc., R. Co.* (Kansas, 1885), 22 Am. & Eng. R. R. Cas. 116; *Uniacke v. Chicago, etc., R. Co.* (Wisconsin, 1886), 27 Am. & Eng. R. R. Cas. 424; *Seefeld v. Chicago, etc., R. Co.* (Wisconsin, 1886), 27 Am. & Eng. R. R. Cas. 428; *Williams v. New Orleans, etc., R. Co.*, 60 Miss. 789; s. c., 20 Am. & Eng. R. R. Cas. 378.

Railroad Company may have Interest when Damages are Reduced on Appeal.—There is no justice in such an obligation unless it is reciprocal. The following authorities will show that this view is recognized, in one case the decision being that the railroad company may have interest on the sum by which the award is diminished, and the others merely disallowing the owner's claim for interest on the whole award.

In *Watson v. Milwaukee, etc., R., Co.* (Wisconsin) 10 Am. & Eng. R. R. Cas. 168, it was held that a railroad company obtaining a diminution of the award on appeal was entitled to recover, from the party withdrawing the award, diminution with interest. The court observes: "Applying the rule that all the courts have as to the payment of interest on the money awarded to the owner for his damages, when the same are increased upon the appeal of the land-owner, the company was entitled to the interest allowed in this case. The value of the lands taken and the damages sustained by the taking are

assessed as of the date of the taking of the same by the company, and interest is always allowed upon the sum so fixed from the date of the taking to the rendition of the verdict; and the fact that the company has paid the money into court awarded by the commissioners, does not affect the question of interest unless the owner has withdrawn the same from the court. If the company must pay, by way of damages, interest on the unascertained amount of damages the land-owner is entitled to from the time it takes possession of the land, there would seem to be a like obligation on the part of owner to pay interest on the part of the damages received by him, and which the law requires him to refund to the company. *Pierce on Railroads*, 220; *West v. Milwaukee, etc., R. Co.*, 14 N. W. Rep. 292."

In *Reisner v. Atchison Union Depot, etc., R. Co.*, 27 Kans. 382; s. c., 10 Am. & Eng. R. R. Cas. 155, where the land-owner, upon an appeal from the award of commissioners as to the appraisement of value and assessment of damages for right of way, recovered a less amount in the district court than the award, he was held not to be entitled to interest upon the money deposited by the company during the pendency of such appeal. The court observes: "We think that when the money has been deposited as required by the statute, for the benefit of the land-owner, and upon appeal the land-owner recovers less than the deposit, such deposit may be treated as a tender before the appeal, and the railroad is not required to pay interest during the pendency of the appeal. It is true that the appeal vacates the assessment, but as the land-owner had the opportunity to accept such deposit, and on appeal recovers a less sum, whereby it is determined that he should have taken the deposit rather than have appealed, he ought not to be entitled to interest after the refusal of the deposit so tendered."

In *Scott v. St. Paul, etc., R. Co.*, 21 Minn. 322, an instruction was held correct that if the jury found that the plaintiff immediately after filing the award was notified thereof, and payment offered and refused, it released the railroad from any further obligation except to keep the money so offered in readiness to be paid at any time thereafter on demand, and plaintiff's claim for interest on the award was disallowed, the award having been filed December 2, and the tender made December 4.

CENTRAL BRANCH UNION PACIFIC R. Co.

v.

ANDREWS *et al.*

(*Advance Case, Kansas. July 9, 1887.*)

A railroad track was put down in an alley in the city of A., on August 1, 1877. Witnesses were introduced to prove the damages caused by reason thereof to the lots abutting upon the said alley, and upon examination they stated they knew the market value of the said property on or about the first of August, 1877. Upon such a showing they were competent to testify to the value of said property, both before and immediately after the laying down of said track.

Where a witness is offered to prove the damages caused to adjacent real property by laying down a railroad track through an alley, and he testifies

that he did not know the real value of the lots in controversy at the time the track was laid down, but does say that he had an opinion of their market value, and it is in evidence that he has been in the business of buying and selling real estate for nearly 15 years in the city where the lots are situated, he is qualified to give his opinion of the value of the property inquired about.

In an action against a railroad company for damages caused by the laying down of its track through an alley, to lots abutting thereon, the statements of the values of said lots, made by the party whose administrator brings the action, may ordinarily be introduced in evidence by the opposite party; but where such statements are either made a long time before or a long time after the laying down of said track, and the values of the property in that locality have been fluctuating, *held*, not error to reject such testimony.

ERROR from district court, Atchison county.

Everest & Waggener for plaintiff in error.

Hudson & Tufts for defendants in error.

HOLT, C.—This action was begun in the court below by R. S. Andrews in his life-time, in 1878. This is the fourth time that it has been in this court. *Railroad Co. v. Andrews*, 26 Kan. 702; s. c., 5 Am. 1 Eng. R. R. Cas. 370; *Same v. Same*, 30 Kan. 590; s. c., 14 Am. & Eng. R. R. Cas. 248; *Same v. Same*, 34 Kan. 564. This case was last tried in September, 1886, before W. D. W., judge *pro tem.*, to a jury, and a verdict and judgment rendered for the plaintiff for \$3765.98. Plaintiff in error (defendant below) now seeks a reversal of that judgment. For a statement of facts, see *Railroad Co. v. Andrews*, 26 Kan. 702, s. c., 5 Am. & Eng. R. R. Cas. 370; and *Same v. Same*, 30 Kan. 590, s. c., 14 Am. & Eng. R. R. Cas. 248.

The defendant makes quite a number of assignments of error, a part only of which we shall consider in the examination of this case. It contends that the allegation in plaintiffs' petition of the appointment of plaintiffs as administrators of the estate of R. S. Andrews, deceased, is not sufficiently explicit. The allegation is as follows: "*First.* That said said R. S. Andrews died in Atchison county, Kansas, upon March 9, 1883, and thereafter, and upon March 13, 1883, said L. A. Andrews and B. F. Hudson were by the probate court of Atchison county, Kansas, being duly and legally authorized thereto, duly and legally appointed administrators of the estate of said R. S. Andrews, deceased, and letters of administration duly and legally issued to them as such out of and by said court, and that they thereupon duly and legally qualified as such administrators, and have ever since been and now are the duly and legally authorized, appointed, qualified, and acting administrators of the estate of R. S. Andrews, deceased." This is sufficient. It is a brief and direct statement of the facts, in ordinary and concise language.

ALLEGATION OF
APPOINTMENT OF
PLAINTIFFS AS
ADMINISTRATORS
SUFFICIENT.

Another error complained of is that witnesses were allowed to testify as experts to the value of the lots abutting upon the alley immediately after the railroad track was laid down through it. They had been asked simply if they knew the market value of the lots in question on or about August 1, 1877. It appears that the track was laid down in a very short time,—in a few hours,—about August 1, 1877. We believe from their answers that they had knowledge of the market values of the lots in question on or about August 1, 1877, and that they were sufficiently qualified to answer in regard to their value, both before the laying down of the track, as well as immediately afterwards. The time of the laying down of the track was so brief, and the question asked limiting it to “on or about” is broad enough, in our opinion, to permit the testimony to be introduced.

Another objection urged is in allowing A. J. North to give his opinion of the value of said property. He was asked if he knew the market value of the lots in question, and he replied that he did not know the real value, but after some hesitation, upon further examination, said that he had an opinion of their market value. It further appears in the testimony that he has been dealing in land in Atchison since 1870, and had bought land in the part of the city where the lots were situated, although not in the same block. The testimony of Mr. North was not so specific and definite as might have been desired, so far as his qualifications are concerned, yet we think that it was competent.

The defendant still further complains that it was not allowed to introduce in evidence by the witness Challis the admissions or statements made by defendant in his life-time as to the value of the lots. The witness was asked if he had a conversation in regard to this property in the life-time of Mr. Andrews, and he answered in the affirmative. He was not able to definitely fix the time, but he said he guessed it was before 1880. On objection made by plaintiff, he was not allowed to testify. The attorney for the defendant then offered to prove that shortly before the laying down of the track in the alley, and about the time of the construction of the brick building, he entered into the agreement with L. A. Andrews in reference to this property, and that Andrews had placed a valuation on the same. He testified, also, in regard to a conversation had shortly after returning from New York in 1878. There is no admission of the value of the lots in question at or near August 1, 1877. In fact, the admission of the value of the lots was either a long time before or a long time after that date. The offer to prove that the statement was made before the filing of this petition, and about the time that the brick house was built was very indefinite, as the house was built before the track was laid,—how long does not appear in the evidence,—and the petition was not filed

EXPERT TESTI-
MONY AS TO
VALUE OF LOTS.

TESTIMONY OF
NORTH AS TO
VALUE.

ADMISSION BY
DEFENDANTS AS
TO VALUE OF
LOTS.

until 1878. While ordinarily all the admissions of the party ought to be introduced in evidence, and while it might not have been error to have admitted the testimony of Challis in this case, it further appears in evidence that the market value of lots and real property in the city of Atchison was fluctuating, and to have ascertained the value at the various times named would not have been a definite basis from which to have established the value of the same August 1, 1877. If the market value of the land had been nearly the same all these years, then the testimony sought to be introduced would have been more in point. But under the other testimony introduced, showing the changing values of such property in the city, it seems to us that this rejection of the testimony offered is not material error.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT.—It is so ordered ; all the justices concurring.

Opinion Evidence as to Value of Land in Condemnation Proceedings.—See *Johnson v. Freeport & Mississippi Riv. R. Co.*, 25 Am. & Eng. R. R. Cas. 192; *McReynolds v. Burlington, etc., R. Co.*, 14 Ib. 172; *Burlington, etc., R. Co. v. Schluntz*, 14 Ib. 182; *Winklemans v. Des Moines, etc., R. Co.*, 14 Ib. 186; *Missouri Pac. R. Co. v. Coon*, 14 Ib. 202; *Central Branch etc., R. Co. v. Andrews*, 14 Ib. 248; *Marquette, etc., R. Co. v. Haughton*, 14 Ib. 355; *Smith v. Chicago, etc., R. Co.*, 14 Ib. 384; *Chicago, etc., R. Co. v. Anderson*, 14 Ib. 97; *Hollingsworth v. Des Moines, etc., R. Co.*, 17 Ib. 118; *P. & L. E. R. Co. v. Robinson*, 1 Ib. 468; *Kansas City, etc., R. Co. v. Allen*, 5 Ib. 362; *Fremont, etc., R. Co. v. Whalem*, 5 Ib. 364; *Sherman v. St. Paul, etc., R. Co.*, 10 Ib. 193; *Republican V. R. Co. v. Arnold*, 10 Ib. 219.

Admissions of Owner as to Value of Land Taken.—The declarations of the owner of the land as to its value, his offer of it at a fixed price, and sale of a portion of it, are evidence on the question of damages, as constituting his estimate of its value as against the land-owner. *East Brandywine & W. R. Co. v. Rank*, 78 Penn. St. 454. And where the land-owner died while the proceedings were pending, and a trustee was substituted as a party, under an agreement that no rights of the defendant should be prejudiced thereby, it was held that the agreements, declarations, and admissions of the deceased were competent evidence as against the trustee so substituted. *Power v. Savannah, etc., R. Co.*, 56 Ga. 471.

CEDAR RAPIDS, I. F. & N. W. R. Co. v. RYAN (1) *et al.*

SAME v. KELLY, *et al.*

(*Advance Case, Minnesota. May 12, 1887.*)

Rule followed that in condemnation proceedings, when several lots constitute and are used as one farm, the damage to the whole as a unit is to be allowed, though but a part of one of the lots be actually taken.

And, also, the rule that, in providing the damage, the value of the farm without the railroad on it, and its value with the railroad on it, may be shown.

APPEAL from district court, Rock county.

Condemnation proceedings. The plaintiff having appealed from the awards of the commissioners, a trial was had in the district court of Rock county before PERKINS, J., and a jury, and a verdict was rendered for defendants in each case. Plaintiff appeals from orders refusing new trials.

Daniel Rohrer for Cedar Rapids, I. F. & N. W. R. Co., appellant.

E. H. Canfield and *C. C. Willson* for Ryan, respondent.

GILFILLAN, C.J.—There was no error in the trial of either of these cases. In each the evidence tended to show that the land of the respondent, consisting of several 40-acre pieces lying alongside each other, made and was used as one farm; thus bringing the case within the rule always followed by this court, that where, in condemnation proceedings, several distinct lots or subdivisions are in fact united by being used for one purpose, so that they are practically one tract or piece, as, for instance, one farm, the damage for the whole is to be allowed, though but a part of only one lot or subdivision be taken. It was therefore proper to show that, not merely the particular lot or subdivision, but the whole farm as a unit, was injured by the taking, and to what extent. And to prove the extent of the damage to the farm, it was proper, as this court has always held since *Simmons v. St. Paul & C. R. Co.*, 18 Minn. 184 (Gil. 168), to prove the value of the farm without the railroad, and its value with the railroad on it.

The point made in the Kelly Case, that his only title to one of the 40's was under a certificate of sale from the State land commissioner on a sale of school lands, is not well taken. If he had any interest in that 40, and any injury was done to the 40 by the taking, he was entitled to damages on account of that 40. What part of the damages done to it he was entitled to might, of course, be affected by the character or extent of his title. But that question does not seem to have been presented to the court below. No objection nor request to charge was made which would call the court's attention to it. Had that been done, the respondent would have had an opportunity, and perhaps would have been able, to prove that he had paid the entire purchase-price of the 40, when, of course, he would have been entitled to all the damages done it.

Order affirmed.

See next case and note.

CEDAR RAPIDS, I. F. AND N. R. Co.

v.

RYAN (2) *et al.**(Supreme Court of Minnesota. May 25, 1887.)*

The appellant's road crosses respondent's farm, composed of 160 acres, near the west boundary line thereof. *Held*, following the established rule in this court, that damages to the whole tract might properly be considered by the jury in estimating respondent's damages, and also that evidence of the market value of the whole farm before the appropriation of the right of way through the same by the railway company, and of the market value of what remains to the owner after the taking and occupation thereof, was properly received. The opinions of witnesses as to the probable future use of real estate are not competent to be received, but the eligible situation of land near a village or city, and the effect thereof upon the present value of the land, is a proper subject for consideration.

APPEAL from district court, Rock county.

Daniel Rohrer for Cedar Rapids, I. F. & N. W. R. Co., appellant.

E. H. Canfield and *C. C. Willson* for Ryan, respondent.

VANDEBURGH, J.—The respondent owns and occupies the southeastern $\frac{1}{4}$ of section 2, in township 102, of range 45. The petitioner sought to acquire a right of way 100 feet in width across the same, near the west boundary thereof.

1. The evidence sufficiently shows that this quarter section was the farm of respondent, occupied by him, and it is so described and referred to by the witnesses, and the respondent's residence is situated on the same, near the centre of the tract. It was properly treated as one tract, and the damages to the entire quarter section were properly considered. *Wilmes v. Railroad Co.*, 29 Minn. 242; s. c., 10 Am. & Eng. R. R. Cas. 161.

2. As respects the proof of respondent's damages, witnesses familiar with the value of the land were allowed to give evidence of the value of the whole tract per acre before the appropriation of the land taken, and after such taking and occupation thereof by the railroad company. This method was according to the usual course and practice in the courts of this State, as allowed and sanctioned by this court.

3. The allowance of the question put by respondent's counsel to the witness Bullis, on his cross-examination, as to whether there was a fair prospect that this land would be wanted for town lots

some day, was, we think, error without prejudice. The witness had testified that the land was close to the town, and the road would run between it and the town. The eligible situation of the land, and the effect of the railroad upon it, in so far as these facts might affect the question of its present value, were proper subjects for consideration. *Sherman v. Railroad Co.*, 30 Minn. 229; s. c., 10 Am. & Eng. R. R. Cas. 193; *Russell v. Railroad Co.*, 33 Minn. 213; s. c., 20 Am. & Eng. R. R. Cas. 191. But no estimate was made by any witness, in whole or in part, upon the supposed future value of the land for town lots, but all the witnesses testified to its then actual market value, and the court gave the jury proper instructions on the subject, and the proper rule for estimating the damages.

4. The strip of land taken on the westerly margin was not accurately defined in the questions put to some of the witnesses, but it is evident that they knew the situation of the land, and no prejudice could have arisen from this cause. We discover no ground for disturbing the decision of the court below.

Order affirmed.

Measure of Damages for Injury to Whole Property where only Part is Taken.—Authorities upon the question of the measure of damages for injury to the owner's whole property where only part thereof is taken, are numerous. They present, of course, many variations of facts which have led to a variety of methods of expressing the general rule. It will be sufficiently accurate, while presenting numerous examples, and many of the late decisions, conveniently classified, to say that in estimating the damages under such circumstances allowance will be made to the land-owner for the injurious consequences to his remaining property of the taking of part of it.

In *Sherwood v. St. Paul, etc., R. Co.*, 24 Minn. 127, where the land taken was a portion of a brick-yard, the owner was permitted to show that the proposed appropriation would prevent an enlargement of the land; that it would render it inconvenient for him to conduct his business there; and that he would be subject to the necessity of crossing the tracks in hauling clay to the pits.

In *Bigelow v. West Wisconsin R. Co.*, 27 Wis. 478, it was held that where a party owned a whole quarter-section of land, one forty-acre tract of which was traversed by the railroad, he was entitled to recover damages for the effect of the appropriation on the whole quarter-section, and not on the one forty-acre tract merely.

The manner in which the railroad passing through the land cuts it up, the amount and location of the land taken, the inconvenience to the owner in passing from one part of his field through its runs to another, the absence of proper crossings, and the overflowing of the land caused by the road, all are proper elements of damages for taking the right of way. *Springfield, etc., R. Co. v. Rhea*, 44 Ark. 258.

In estimating the damages payable to tenants, it is proper for the jury to consider, as elements of damage, the fact that the location of the railroad compelled the removal of the business conducted by the tenants, and the depreciation in value of the leasehold, and also of the machinery and personal property of the tenants used in their business, consequent upon such removal. The difference between the value of the machinery in connection with the business conducted on the property, and its value to be removed

and applied to the same or other use, is a proper element of damage to be considered by the jury. *Getz v. Philadelphia, etc., R. Co.*, 105 Pa. St. 547.

In *Kansas City, etc., R. Co. v. Merrill*, 25 Kan. 421; s. c., 2 Am. & Eng. R. R. Cas. 485, the plaintiff was the owner of 960 acres of land lying in a body and used for the purposes of a stock-ranch. The railroad ran nearly diagonally through one quarter-section, and cut off the water, timber, the house, and corral, from the main body of land, but did not touch the other quarters of the ranch; a regularly laid-out public highway separated the quarter through which the railroad ran from one whole section. *Held*, that the land-owner was entitled to recover damages for the injury to the whole property, and not merely for that to the separate quarter for which the railroad was liable.

In *Baltimore, etc., R. Co. v. P. W. & Ky. R. Co.*, 17 W. Va. 812; s. c., 10 Am. & Eng. R. R. Cas. 444, it was held, that where a State constitution provides that property shall not be taken for public use without just compensation, the damage to the residue of the tract where a part is taken is an element of damage to be considered by the commissioners or jury, as the case may be.

In *Reisner v. Atchison, etc., Depot Co.*, 27 Kan. 382; s. c., 10 Am. & Eng. R. R. Cas. 155, an owner of two adjacent lots was held entitled to recover damages to the two lots, although only a portion of one was actually taken, on the ground that the two were used for a single purpose, that of a hotel yard. *Atchison, etc., R. Co. v. Gough*, 10 Am. & Eng. R. R. Cas. 151.

Defendant constructed its line of road on a line and course through plaintiff's land, which required the raising of the railroad-bed above the ordinary level of the adjacent land. The embankments thus formed constituted an obstacle to the plaintiff's direct passage across the road to the tract beyond. After condemnation and assessment of damages, plaintiff brought suit for damages, resulting from increased difficulty of communication between the parts of the tract. *Held*, that damages resulting from such a source are construed to have been included in the assessment of damages in proceedings condemning the land for the use of the road. Such an assessment of damages embraces all past, present, and future damage which the improvement may hereafter reasonably produce. *International & G. N. R. Co. v. Pape*, 62 Tex. 813.

Where proceedings are taken to condemn a strip of land across the right of way of a railroad, the damages should not be actually confined to the strip taken, but should include the damage done to the first railroad company's remaining property by the operation of the second railroad. *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 100 Ill. 21; s. c., 2 Am. & Eng. R. R. Cas. 454.

Statements of the Rule in Such Cases.—In *Welch v. Railroad Co.*, 27 Wis. 108, the court remarked: "In such cases the damages must always very much depend upon the use to which the property is appropriated, and its situation and value with reference to other property of the same owner with which it is connected in use; and that rule of valuation would seem to be the only true one which makes the compensation go hand in hand with the actual loss or injury sustained by the person whose land is thus taken. People may do what they will with their own; this is the essential idea of property; and whilst speculative damages cannot be allowed, yet actual damages, its value to the owner, his use being considered, must always be."

In *Rockford, etc., R. Co. v. McKinley*, 64 Ill. 335, the court said: "The jury are entitled to know the amount of land taken; how it affects the remainder; how it divides the farm, in case of farm-lands, as to water, pasturage, improvements, etc., and also the danger and inconvenience in the perpetual use of the track for moving trains over, and what injury, if any, to stock kept on the farm, and many other things connected therewith which

are understood, and can be better explained by persons of large experience in such matters, and we may say, as a general rule, that any evidence which tends to illustrate these various subjects is admissible."

In *Henderson, etc., R. Co. v. Dickerson*, 17 B. Mon. (Ky.) 178, the court observed: "The constitution secures to the owner of land just compensation for his property before he can be deprived of its value to him, considering its relative position to his other land, and the other circumstances which may diminish or enhance that value can alone afford a just compensation for its loss. To third persons the same quantity of land of equal quality, on one of the boundaries of the farm, may be of as much value as if it were situated in the middle of the farm; but at the same time this value thus ascertained may be a very inadequate compensation to the owner if the land were taken out of the middle of the farm, instead of being taken on one of its boundary lines. The real value of the land to the owner as it is actually situated, and not merely its value regarding it as a separate and independent piece of land, he has a right to demand, and nothing else can secure him just compensation for his property."

Classified Authorities.—*Arkansas*.—*St. Louis, etc., R. Co. v. Anderson*, 39 Ark. 167; s. c., 17 Am. & Eng. R. R. Cas. 97; *Little Rock, etc., R. Co. v. Allen*, 41 Ark. 431.

Georgia.—*Selma, etc., R. Co. v. Redwine*, 51 Ga. 470.

Indiana.—*Baltimore, etc., R. Co. v. Lansing*, 52 Ind. 229; *Grand Rapids, etc., R. Co. v. Horn*, 41 Ind. 479; *White, etc., R. Co. v. McClure*, 29 Ind. 536.

Illinois.—*Rockford, etc., R. Co. v. McKinley*, 64 Ill. 388; *Keithsburg, etc., R. Co. v. Henry*, 79 Ill. 290; *Tonica, etc., R. Co. v. Unsicker*, 22 Ill. 221; *Chicago, etc., R. Co. v. Dresel*, 110 Ill. 89; s. c., 20 Am. & Eng. R. R. Cas. 263; *Chicago, etc., R. Co. v. Blake*, 24 Am. & Eng. R. R. Cas. 288.

Iowa.—*Buchanan v. C. C. & D. R. Co.*, 46 Iowa, 366; *Hartshorn v. B. C. R. & N. R. Co.*, 52 Iowa, 613; *Cummins v. Des Moines, etc., R. Co.*, 17 Am. & Eng. R. R. Cas. 86. *Compare Haines v. St. Louis, etc., R. Co.*, 20 Am. & Eng. R. R. Cas. 260.

Kentucky.—*Richmond, etc., Turnpike Co. v. Rogers*, 1 Duv. 135; *Henderson, etc., R. Co. v. Dickerson*, 17 B. Mon. 178.

Maryland.—*Montmorency Gravel Road Co. v. Stockton*, 43 Md. 328.

Missouri.—In *Pacific Railroad v. Chrystal*, 25 Mo. 544, the court said, that among the disadvantages to be compensated are those arising from the taking of only a part of a tract, which, from a variety of causes, may more or less impair the value of the part left, or entirely destroy its value. *Kansas City, etc., R. Co. v. Waldo*, 70 Mo. 629.

Massachusetts.—*First Church v. Boston*, 14 Gray, 214; *Commonwealth v. Coombs*, 2 Mass. 489; *Walker v. Old Colony R. Co.*, 103 Mass. 10.

Minnesota.—*Winona, etc., R. Co. v. Waldron*, 11 Minn. 515; *Winona, etc., R. Co. v. Denman*, 10 Minn. 267; *Simmons v. St. Paul, etc., R. Co.*, 18 Minn. 184; *Lake Superior, etc., R. Co. v. Greve*, 17 Minn. 322; *Mix v. Lafayette, etc., R. Co.*, 67 Minn. 319; *Scott v. St. Paul, etc., R. Co.*, 21 Minn. 322; *Wilmes v. Minneapolis, etc., R. Co.*, 10 Am. & Eng. R. R. Cas. 161; *County Commissioners v. St. Paul, etc., R. Co.*, 10 Am. & Eng. R. R. Cas. 209.

Nevada.—*Virginia, etc., R. Co. v. Henry*, 8 Nev. 165.

New Hampshire.—*Dearborn v. Boston, etc., R. Co.*, 24 Fost. 179; *In re Mt. Washington R. Co.*, 35 N. H. 134.

North Carolina.—*Raleigh, etc., R. Co. v. Wicker*, 74 N. Car. 220.

Kansas.—*Kansas City, etc., R. Co. v. Merrill*, 25 Kan. 421; s. c., 2 Am. & Eng. R. R. Cas. 485.

Ohio.—*Cleveland, etc., R. Co. v. Ball*, 5 Ohio St. 568.

Pennsylvania.—*E. Pennsylvania R. Co. v. Hiester*, 33 Penn. St. 426; *Watson v. Pittsburg, etc., R. Co.*, 37 Pa. St. 469.

South Carolina.—White *v.* Charlotte, etc., R. Co., 6 Rich. 47.

Wisconsin.—Parks *v.* Wisconsin Central R. Co., 43 Wis. 413; Chapman *v.* Oshkosh, etc., R. Co., 33 Wis. 629; Robbins *v.* Milwaukee, etc., R. Co., 6 Wis. 636; Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364; s. c., 20 Am. & Eng. R. R. Cas. 225.

Canada.—Ontario, etc., R. Co. *v.* Taylor, 6 Ont. Q. B. Div. 338; s. c., 17 Am. & Eng. R. R. Cas. 100.

Evidence of Prospective Use of Land in Determining Damages.—See Little Rock, etc., R. Co. *v.* McGehee, 20 Am. & Eng. R. R. Cas. 82; Washburn *v.* Milwaukee, etc., R. Co., 20 Ib. 225; Scott *v.* Indianapolis, etc., R. Co., 10 Ib. 189; Sherman *v.* St. Paul, etc., R. Co., 10 Ib. 193; Everett *v.* Union Pac. R. Co., 10 Ib. 204; St. Louis, etc., R. Co. *v.* Kirby, 10 Ib. 214.

BARNES *et al.*

v.

MICHIGAN AIR-LINE R. Co.

(*Advance Case, Michigan. April 14, 1887.*)

Several years after condemnation proceedings are had, a mill-owner is not entitled to recover damages for injury to his water-power by reason of the completion of a railroad bridge in a manner that is common, and proper, if not absolutely necessary; as all the damages that the owner might sustain, by reason of the construction and operation of the road, were allowed when the proceedings were had to condemn the land.

ERROR to Oakland.

Henry M. Cheever for plaintiffs.

E. W. Meddaugh and *Aug. C. Baldwin* for defendant and appellant.

CAMPBELL, C.J.—Plaintiffs own and occupy a paper-mill in Rochester, Oakland county, run by water-power derived from Clinton river and Paint creek. This suit is brought for FACTS. damages alleged to have been caused by the construction and maintenance of railroad tracks and bridges across the premises of plaintiffs, damaging the water-power, and otherwise injuring them. Upon the trial the case was submitted by the court to the jury upon such damages as were caused by certain braces or cross-pieces, whereby the bridge piles across the water-way were held together in place. Many questions were ruled on and brought up for review, which, as we regard the case, need not be discussed, although, upon a different state of pleadings and controversy, they would be important and require notice.

The declaration is in case for an entry about the close of November, 1878, under color of a legal statutory condemnation, and the construction of track bridges, and other things somewhat specifically described. The only obstruction set forth concerning obstruction of the races is the driving of piles and the deposit of stones. All of these things are set out as the pursuance of a single scheme, whereby the alleged nuisance was created in pursuance of an authority claimed to be legal, but which was not legal. The defence is that, while the defendant company proceeded in the first instance to build and carry out its improvements under color of proceedings which were reversed, yet a subsequent condemnation was had, which was confirmed, and plaintiffs were awarded compensation which is final, and cannot be swelled by further litigation. These latter proceedings were subsequent to anything which can be properly regarded as charged in the declaration; and in our opinion they covered everything which was submitted to the jury. The declaration does not set up, and we think the facts do not show, any change of plan in the bridges, or anything which was not the natural and legitimate completion of the structure, which was so far progressed in when the second proceedings were had that the entire nature and probabilities of the damages were fairly before the jury. There is no practical difference of opinion concerning the fact that a pile bridge is unsafe and incomplete without stays, and there is nothing in the declaration counting upon any such addition as a cause of damage. The view taken by the pleader in

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drawing the declaration was in precise accord with the weight of the testimony, and cannot be supposed to have been careless or improper. The case was evidently commenced with an idea that some question could be raised concerning continuing damages as not precluded by the award. But it is the settled law of this State that when proceedings are had to condemn lands for railways, the jury should consider, and the land-owners should lay before them, all the consequence of the appropriation of the land in the manner in which the company will use it. This was laid down in *Harlow v. Marquette, H. & O. R.*, 41 Mich. 336, the doctrine in which was followed in *Dunlap v. Toledo. A. A. & G. T. R.*, 50 Mich. 470; s. c., 10 Am. & Eng. R. R. Cas. 185. The same principle is familiar in many shapes. It is the business of the jury to compensate the owner for what his landed interest will suffer from the use proposed to be made of it by the railroad company. The company cannot be expected or required to resort to a new condemnation whenever some new expenditure is to be made or change effected, unless it is something so plainly repugnant to or varying from the purpose originally contemplated as to amount to a change of user. It is not necessary to consider now how far such variations must go to be so accounted, but they must be at least very serious. In the

present case nothing was done beyond completing a bridge in such a way as is common and proper, if not absolutely necessary. There would be no safety in condemnation proceedings if such action would require a new condemnation.

The case presented, as left to the jury, and as shown by the plaintiff's testimony, no cause of action. The judgment must be reversed, with costs of both courts.

The other justices concurred.

Continuing Damages.—What is Precluded by Award in Condemnation Proceedings.—See *Dunlap v. Toledo & A. A. R. Co.*, 10 Am. & Eng. R. R. Cas. 185; *West v. West*, etc., R. Co. 20 Ib. 402; see also note to *St. Louis*, etc., R. Co. *v. Walbrink*, 26 Ib. 607.

Presumption that All the Injuries were Estimated.—It is a presumption of law that the commissioners in making their award estimated all the injuries that would occur to the land-owner. Even unforeseen injuries will be presumed to have been considered. *Aldrich v. Cheshire R. Co.* 20 N. H. 359; *Furniss v. Hudson River R. Co.*, 5 Sandf. (N. Y.) 551; *Van Shaick v. Delaware & R. Canal Co.*, 20 N. J. L. 249; *Troy & Boston R. Co. v. Northern Turnpike Co.*, 16 Barb. (N. Y.) 100; *Baltimore & S. R. Co. v. Campton*, 2 Gill (Md.), 20; *Butman v. Vt. Central R. Co.*, 27 Vt. R. 32.

CONCORDIA CEMETERY ASSOCIATION

v.

MINNESOTA AND NORTHWESTERN R. Co.

(*Advance Case, Illinois. June 17, 1887.*)

Proceedings were instituted by a railroad company for the condemnation of a strip of land in the middle of a larger tract. On the question of damages the jury were instructed that the total compensation to be given to the owner of the land was the difference between the value of the entire tract of land before condemnation, and the value of what remains after the taking of part. It was alleged that the instruction was erroneous as directing the jury to deduct any benefits which the railroad company might cause to the remainder of the land from the value of the strip taken. *Held*, that the instruction was proper; as the result alleged could only be true where the benefits exceeded the damages to the land not taken, and the jury in fact found that the damages to the land not taken exceeded the benefits.

It was provided by a village ordinance that "The boundaries of all cemeteries . . . are hereby fixed at the enclosures now surrounding any such cemeteries; and the boundaries of such cemeteries as are not enclosed shall be the same as now appear of record in the map, plat, or deeds of such cemeteries." *Held*, that a deed of a described tract of land conveying it as a cemetery would be a dedication of it as a cemetery, and prescribe the boundaries of the cemetery; but a deed to a corporation empowering it to buy and sell land for burial purposes is not, *ipso facto*, a deed creating a

cemetary and prescribing its boundaries. Such a corporation, in order to get requisite lands, may be compelled to buy some other lands not adapted to cemetery purposes; and such lands may be sold by the corporation without ever becoming a part of any cemetery, under the provisions of Illinois Pub. Laws, 1875, pp. 40, 41. The purpose of the ordinance was to declare the boundaries of the cemeteries to be the limits of lands actually prepared for and devoted to burial purposes. Land not so devoted would not become a part of the cemetery by merely being within the same enclosure, without marking and distinguishing it from the adjoining ground as a place of burial; and an instruction to the jury, in a proceeding to condemn such land for railroad purposes, that, if the jury believe from the evidence that at the time of the passage of the ordinance said land was not so used or enclosed, then the jury are instructed that in determining the market value of the land proposed to be taken, for the purpose of assessing the compensation, its value for cemetery purposes is not to be considered by the jury, was proper.

In proceedings against a cemetery association to condemn land for a right of way, the jury assessed damages as to other parties. *Held*, proper, under section 5, c. 47, Rev. St. Ill. 1874, which provides that any number of separate parcels of property situate in the same county may be included in one petition, and the compensation for each shall be assessed separately, by the same or different juries, etc.

In assessing the value of land taken for a right of way, evidence of the sales of prairie land one mile distant is not incompetent, there being no conclusive evidence as to the value of the land condemned.

In assessing the value of a strip of land condemned for a right of way, which was not itself used for cemetery purposes, but was part of a tract of land owned by a cemetery association, *held*, that the value of lots in other cemeteries was not competent evidence.

The verdict of a jury assessing the value of land condemned for a right of way will not be set aside as being too small, where a greater value is only figured out by conjectures as to future probabilities.

Lands belonging to cemetery associations incorporated under the laws of Illinois, not required for burial purposes, may be sold under the act of May 15, 1875 (pages 40, 41, Pub. Laws 1875).

APPEAL from Cook County.

Martin Beem and Carlos P. Sawyer (*R. S. Thompson*, of counsel) for Concordia Cemetery Association, appellant.

Gaedener, McFadon & Gardner for Minnesota & N. W. R. Co., appellee.

SCHOLFIELD, J.—This proceeding was commenced by petition filed in the court below by the Minnesota & Northwestern R. Co.

FACTS. to condemn for its right of way a strip of land, 100 feet in width, across certain lands belonging to appellant in the village of Harlem in Cook county. Appellant filed a cross-petition in the proceeding, alleging therein that the strip of land proposed to be condemned was a part of a larger tract acquired and held for it for burial purposes, and claiming damages to that portion of the tract not taken. A trial was had, and the jury returned a verdict awarding to appellant \$2380 as compensation for the land taken, and \$6450 as damages to the land not taken, upon which the court,

after overruling a motion for a new trial, rendered judgment. Appellant brings the record here, and insists that the court below erred in its rulings on the trial, to the prejudice of appellant, in the several respects hereinafter considered.

First, The first and fourth instructions given to the jury at the instance of the petitioner are as follows: “(1) The jury are instructed as a matter of law, that defendant is entitled, as compensation, to the cash market value of its land proposed to be taken by the railroad on September 6, 1886. The defendant is also entitled to damages to the remainder of its land, described in the cross-petition, which will be caused by the construction and operation of the railroad.” “(4) The jury are instructed that the total compensation and damages to which the defendant is entitled, under the first instruction, must be equal to, but must not exceed, the difference between the fair market value of the whole land described in the petition and cross-petition as it was on September 6, 1886, and the fair market value of what remains after the taking of part by the railroad company, and the appropriation thereof to its use.”

INSTRUCTION AS
TO MEASURE OF
DAMAGES HELD
PROPER.

It is contended that this directed the jury to deduct any benefits which the railroad might cause to the remainder of the land from the value of the strip taken. This, it is obvious, could only be true in the event that the benefits exceeded the damages to the land not taken. We have held it is competent to consider special benefits to property claimed to be damaged but not taken, for the purpose of reducing—or rather, to the extent of the special benefits, of showing that there are no—damages. *Page v. Chicago, M. & St. P. R. Co.*, 70 Ill. 328; *Chicago & P. R. Co. v. Francis*, Id. 238; *Todd v. Kankakee, etc., R. Co.*, 78 Ill. 530; *Chicago, etc., R. Co. v. Hall*, 90 Ill. 42; *McReynolds v. Burlington, etc., R. Co.*, 106 Ill. 152.

We have seen that the verdict here finds the value of the land taken to be \$2380, and the damages to lands not taken to be \$6450, and it is therefore to be presumed that this \$6450 is the excess of any and all special benefits to the land damaged and not taken. Assuming the damages to exceed the benefits in the respect stated, “the difference between the fair market value of the whole land described in the petition and cross-petition, as it was on September 6, 1886, and the fair market value of what remains after the taking of a part by the railroad company, and the appropriation thereof to its use,” makes appellant whole,—gives it, presumptively, the same money values, notwithstanding the taking, that it would have had, had its land not been taken and damaged. For it gets the value of its land, as of the date of the taking, and the damages it sustains—the extent of its injuries over its benefits—to its property not taken. *Green v. Chicago*, 97 Ill. 370.

The parties agreed that the value of the property taken, and the

damages to the property not taken, should be assessed as of the date of filing the petition; and, this being so, there can be no presumption that general benefits have been deducted from the valuation. The taking and damaging are, in theory, then done; and it is the value of the property, as then presumably enhanced by the prospective benefits to result from the construction of the road for which the owner is entitled to be reimbursed, to the extent he has been deprived of it by the taking and damaging.

Second. Appellant is a corporation organized under the general law to buy and sell real estate for burial purposes. It owns real estate conveyed to it by deeds conveying the title generally, without specifying the purpose. Its real estate, including that here taken and damaged, lies within the limits of Harlem, in Cook county, a village incorporated under the general law. The following ordinances of the village were duly adopted at the date annexed, and thence hitherto have remained and still are in force as ordinances of the village, namely:

VILLAGE ORDINANCE CONCERNING CEMETERIES.

“CEMETERIES.

“Be it ordained by the president and board of trustees of the village of Harlem:

“Section 1. That no corpse shall be interred in any place within the limits of the village of Harlem not actually used as a cemetery on the first day of October, 1884, or lying within the enclosure of a cemetery not established on or before said day, except as hereinafter provided.

“Sec. 2. No corporation or person or persons shall establish or open any cemetery within the limits of the village of Harlem, unless the board of trustees of said village of Harlem shall first fix and determine the location of such cemetery, and fix the boundaries thereto.

“Sec. 3. The boundaries of all cemeteries within the limits of the village of Harlem are hereby fixed at the inclosures now surrounding any such cemeteries; and the boundaries of such cemeteries as are not enclosed shall be the same as now appear of record in the maps, plats, or deeds of such cemeteries.

“Sec. 4. No corporation, person or persons shall enlarge the boundaries of any cemetery within the limits of the village of Harlem, as the same are now recorded, unless the board of trustees shall fix and determine the boundaries of any cemetery so to be enlarged.

“Sec. 5. It shall be lawful to inter dead bodies within the limits of any cemetery established and used as a cemetery on the first day of October, 1884, under such rules and regulations as may from time to time be made by the board of trustees; but the burial of any corpse outside of such limits, and within said village of

Harlem, shall be deemed a violation of sections 1 and 2 of this ordinance.

"Sec. 6. If any person shall violate any of the provisions of this ordinance, he shall be fined, on conviction thereof, not exceeding one hundred dollars, or imprisoned not exceeding three months, or both, in the discretion of the court. It shall be lawful for the court to order the offender to disinter any and all dead bodies that he may be proven to have buried contrary to the provisions of this ordinance, and to enforce obedience to such order by fines, or imprisonment, or both. It shall be lawful for any person, under the direction of the board of trustees, to disinter any corpse, buried contrary to the provisions of this ordinance, and to remove and reinter the same within the lawful bounds of any cemetery.

LEO. G. HAASE, Village Clerk.

"Passed October 11, 1884. Approved October 14, 1884.

"J. H. C. SCHROEDER, President."

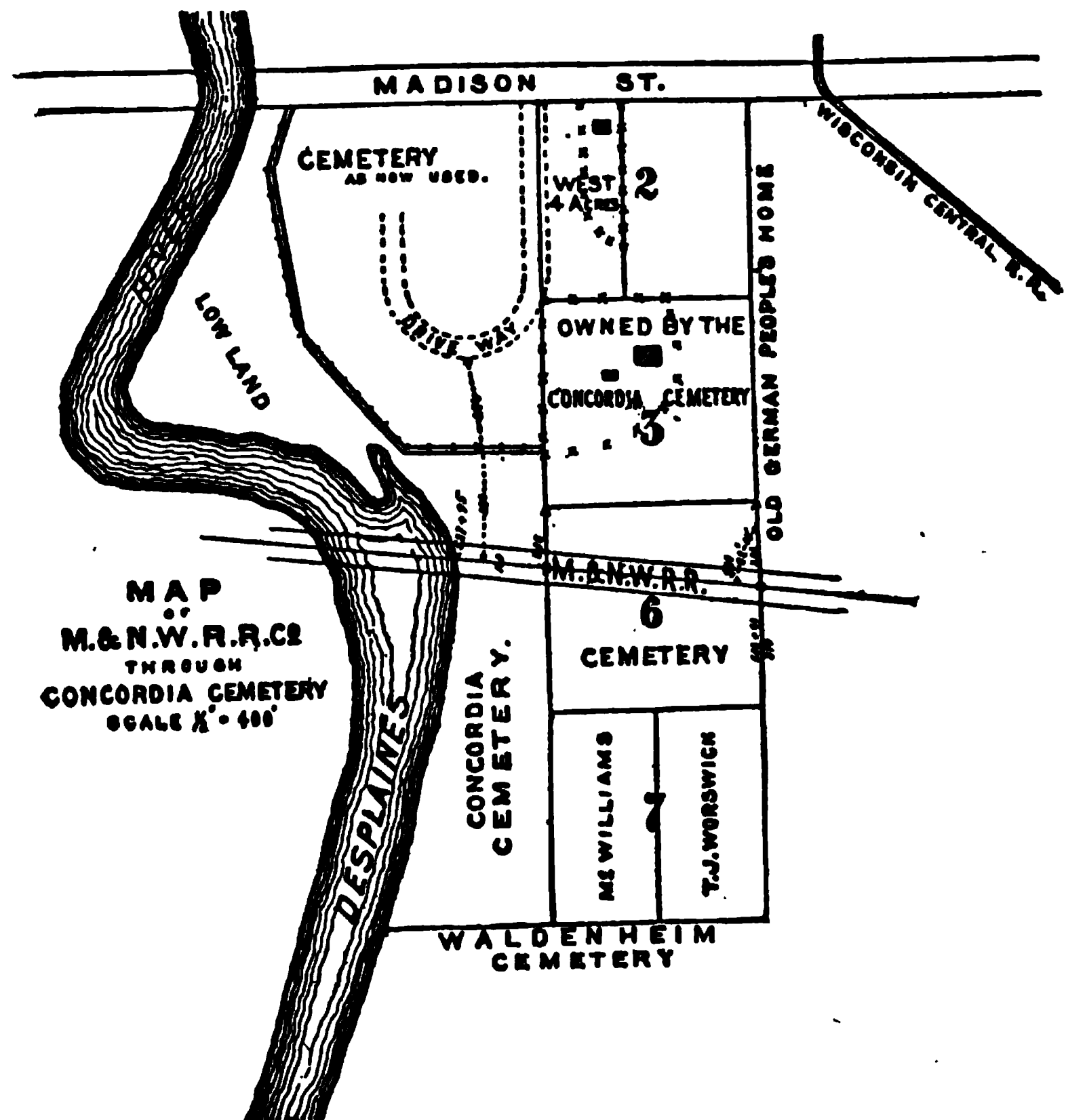
It was agreed for the purpose of this trial, that in October, A.D. 1884, the following described fences were the only fences on the property of said defendant, described in its cross-petition herein: "From the northeast corner of said 'west four acres of lot two (2),' extending west along the north line of defendant's property on Madison street to within twenty (20) feet of the Desplaines river, said fence being a picket fence.

FENCES ON THE
PROPERTY OF
DEFENDANT.

Thence a similar fence, in a curving line, skirting the said river, southerly to a point about three hundred and thirty-eight (338) feet north of said petitioner's proposed right of way; thence in an easterly direction to the western line of said lot three (3). A similar picket fence on the extreme southern boundary of said defendant's said property, separating the same from Waldheim Cemetery, and extending from the Desplaines river, in a direct line, east along the line of said Waldheim Cemetery. A fence extending from the southeast corner of lot six of said defendant's property, in a northerly direction, along the east line of said lot six (6), and of said lot three (3), to the northeast corner of said lot three (3); thence in a westerly direction, along the north line of said lot three (3), to the southeast corner of said west four acres of lot two (2); thence north along the east line of said west four acres of said lot two (2) to Madison street. Also a fence extending from the northwest corner of said west four acres of lot two (2), at its intersection within Madison street, in a southerly direction, along the west line of said west four acres, for about two thirds the length of said west line of said west four acres; thence in an easterly direction to the east line of said west four acres of lot two (2)." This will be more intelligible by reference to the annexed map.

The evidence shows that the grounds laid out into cemetery lots,

and improved for cemetery purposes, on the 1st day of October, 1884, were all on the north side of the fence described as running east from a point about 338 feet north of the petitioner's proposed right of way, thence in an easterly direction to the western line of lot three,—which lot did not then, but does now, belong to the appellant. There seems to have been two graves of children on or near the right of way, put there, not in good faith as an extension of the cemetery, but after notice of the survey of petitioner's line, under and because of legal advice then given.



The court instructed the jury, at the instance of appellee, that, "under the ordinance of the village of Harlem offered in evidence, the cemetery association, defendant, had no right to bury any dead on the land described in the petition, unless at the time

of its passage said land was actually used as a cemetery, or inclosed within the grounds of the association. If the jury believe from the evidence that at the time of the passage of the ordinance said land was not so used, or so inclosed, then the jury are instructed that in determining the market value of the land proposed to be taken, for the purpose of assessing the compensation, its value for cemetery purposes is not to be considered by the jury." It is contended that this instruction ought not to have been given; that its effect is to mislead, because, under the ordinances of the village, it was sufficient (this cemetery not being inclosed) that its boundaries were co-extensive with the deeds to appellant.

INSTRUCTIONS AS
TO LAND USED
FOR CEMETERY
PURPOSES.

We are unable to yield our assent to this construction. We cannot assume that the village trustees intended to apply different rules in this respect to different cemeteries, unless there was something in the nature of things requiring such difference; because such a discrimination would be unreasonable and unjust, and the ordinances could not, therefore, be enforced. Cooley Const. Lim. (1st Ed.) 200, 201. There can be no reason why a corporation having grounds, some inclosed and some uninclosed, should be restricted in the use of its grounds more than a corporation not having any of its grounds inclosed, or why a corporation which has platted some of its lands should be more restricted than a corporation which has made no plat.

PURPOSES OF
THE ORDINANCE.

The language of the ordinance here is not that the boundaries shall, in any instance, be co-extensive with the lands owned, as, if that had been intended, it is reasonable to assume would have been said. It is: "The boundaries of all cemeteries . . . are hereby fixed at the inclosures now surrounding any such cemeteries; and the boundaries of such cemeteries as are not inclosed shall be the same as now appear of record in the map, plat, or deeds of such cemeteries;" that is, of course, assuming that there is a map, plat, or deed showing a boundary of a cemetery. And so a deed of a described tract of land, conveying it as a cemetery, would be a dedication of it as a cemetery, and prescribe the boundaries of the cemetery. But, manifestly, a deed of land to a corporation empowered to buy and sell land for burial purposes is not, *ipso facto*, a deed creating a cemetery, and prescribing its boundaries. Such a corporation has a discretion when to lay out its grounds for cemetery purposes, as well as how; and until its lands are laid out and opened to the public as a cemetery they are simply lands belonging to a cemetery corporation. Such corporations, in order to get the requisite lands, may unavoidably be compelled to buy some other lands not adapted to cemetery purposes; and when they do so such lands may be sold by the corporation without ever becoming a part of any cemetery.

BOUNDARIES OF
CEMETERIES—
DEEDS PRE-
SCRIBING.

The manifest purpose here was to declare the boundaries of cemeteries to be the limits of lands actually prepared and devoted to burial purposes. Lands not devoted to burial purposes would not become a part of the cemetery by merely being within the same inclosure, for the language is not "the inclosures now surrounding the lands of the person or corporation owning the cemetery," but "the inclosures now surrounding any such cemeteries." The word "cemetery" is defined by Webster to be "a place or ground set apart for the burial of the dead," and this is the popular idea. What creates the cemetery is the act of setting the ground apart for the burial of the dead, marking it, and distinguishing it from the adjoining ground, as a place of burial. That the ground taken by appellee has never been set apart in any way for burial purposes is proved beyond doubt.

The evidence shows that before burials are allowed on grounds belonging to appellant the grounds are laid off and improved for cemetery purposes, and then appellant sells burial lots and single graves to parties desiring to purchase. And evidence was given by Leopold Branns, appellant's president and treasurer, as to the value of such lots and graves, for the purpose of showing the value of the land here taken, etc., when the following questions were asked, and answers thereto given: "*Question.* Could you sell lots to-day, at any price, at the point where this railroad crosses the cemetery grounds, or the grounds belonging to the cemetery company, at any price?—*Answer.* If we had laid out our sections, we could. *Q.* I mean, as it stands to-day, could you sell cemetery lots down there at any price?—*A.* We haven't any. We have to have them first before we can sell them. We have to lay them out in sections."

We think the court properly construed the ordinance. But counsel again contend that this construction is to declare a partial or a total forfeiture of appellant's franchise, because, if not permitted to use this ground for burial purposes, it is wholly deprived of the use of its property. This is a misapprehension. Lands belonging to cemetery associations incorporated under the laws of this State, not suitable or required for burial purposes, may be sold under the provisions of the act approved April 15, 1875 (Pub. Laws, 1875, pp. 40, 41). All corporations accept their franchises subject to regulation under the police power. Cooley Const. Lim. (1st Ed.) p. 574 *et seq.*, and note. And it is competent under the power, in proper cases, to regulate or restrain burials within villages and cities, etc. Id. 595. The present case does not involve the question decided in *Lake View v. Rose Hill Cemetery*, 70 Ill. 195. In that case it was affirmatively shown that the lands were at a proper distance from the populous part of the city, in a sparsely settled community, and that there were but few dwellings in the

vicinity. No such facts are here shown. It was there conceded that the regulation of burials was a proper subject of municipal regulation.

Third. It is contended the court erred in allowing the jury, during the trial, to be sworn to assess, and to hear evidence, and to assess damages as to other parties. It is provided by section 5, c. 47, Rev. St. 1874, entitled "Eminent Domain," that "any number of separate parcels of property, situate in the same county, may be included in one petition, and the compensation for each shall be assessed separately, by the same or different juries, as the court or judge may direct." We are unable to say, from anything before us, that the court abused the discretion thus conferred.

ASSESSING DAMAGES TO OTHER PARTIES.

Fourth. It is objected that the court erred in allowing witnesses to testify as to the value of property not used, or susceptible of being used, for cemetery purposes; but, if we are right in holding that the court properly construed the village ordinance, this property is not susceptible of that use. We have carefully considered all the evidence; and while much latitude was allowed on both sides in examining witnesses as to the value of the property taken, and the damage to that not taken, we cannot say there was error. Appellant was entitled to have the highest price for which the property could be sold for any purpose, and that idea was, on the whole, kept in view.

EVIDENCE AS TO VALUE OF PROPERTY.

Fifth. We cannot say that evidence in regard to sales of prairie, one mile distant, was incompetent, and not tending, in any measure, to show value; there being no evidence of an actual present market value of this particular property, or of sales of like property nearer, under circumstances which would be conclusive of the question of value.

Sixth. Sales of lots in other cemeteries are claimed to have been competent evidence. We think not, because this property was not laid off into lots and improved as cemetery property.

Seventh. Objection is made to the modification of appellant's fifth instruction. The modification was undoubtedly improper. It was, in fact, a refusal to give appellant's proposition; and the instruction as modified, while stating no rule of law inaccurately, was wholly irrelevant to the case. But every legal proposition which appellant asked to have given in his fifth instruction was given in substance, and with sufficient fulness, in his fourth and seventh instructions, and he could not have been injured by not having them repeated.

Eighth. It is contended the verdict is contrary to the evidence. We do not think so. While the jury might have been justified in giving a larger sum, we cannot say they erred in not doing so. No improvements are affected by this taking; the land taken, and that

in its immediate vicinity, being still in a state of nature. And it is only by a system of conjectures as to future probabilities that appellant figures up a sum for compensation in excess of that returned by the jury. There can be no present certainty as to the *data* upon which these calculations rest, and they are therefore not a proper basis for a verdict.

The judgment is affirmed.

Difference between Values of Entire Tract Before and After Condemnation is Proper Measure of Damages.—Phila. & R. R. Co. *v.* Getz, 28 Am. & Eng. R. R. Cas. 244; Note, 27 Ib. 484; Setzler *v.* Pennsylvania, etc., R. Co., 24 Ib. 280; Neilson, Chicago, etc., R. Co., 14 Ib. 239; St. Louis, etc., R. Co. *v.* Anderson, 17 Ib. 97; Ontario, etc., R. Co. *v.* Taylor, 17 Ib. 100; Lance *v.* Chicago, etc., R. Co., 5 Ib. 617; Chicago, etc., R. Co. *v.* Ritter, 10 Ib. 202.

Evidence of Sale of Other Land Admissible in Assessing Damages.—See note to Pittsburg, etc., R. Co. *v.* McCloskey, 28 Am. & Eng. R. R. Cas. 92; Union, etc., R. Co. *v.* Moore, 5 Ib. 345; Chicago, etc., R. Co. *v.* Maroney, 5 Ib. 360; Watson *v.* Milwaukee, etc., R. Co., 10 Ib. 168; Everett *v.* Union Pac. R. Co., 10 Ib. 204; Washburn *v.* Milwaukee, etc., R. Co. 20 Ib. 225.

BALTIMORE AND OHIO R. CO. *v.* BOYD *et al.*

BOYD *et al.* *v.* BALTIMORE AND OHIO R. CO.

(*Advance Case, Maryland. March 16, 1887.*)

A railroad company instituted condemnation proceedings, entered upon the land, constructed its tracks, and used the same. The proceedings were held under certain city ordinances, and afterwards proved to be defective and insufficient. *Held*, that such entry being without fraud, malice, or evil intent, plaintiffs were not entitled to recover exemplary damages.

A land-owner, whose premises have been subjected to the unauthorized beneficial use and occupation of another, though under color of right, is entitled to substantial damages, to be measured by the fair rental value of the land during the time and for the purpose it was occupied, though no special damage is proven.

Declarations made by counsel on a former occasion in the course of a trial, while urging the question of the damages before a jury of condemnation of the property in question, are not admissible to prove malice on the part of defendant, in order to enhance the damage.

Counsel cannot be permitted to argue to the jury against the instructions of the court, nor to indulge in argument or comment to induce them to disregard such instructions.

Cross appeals from judgments of the Baltimore city court, in favor of plaintiffs in actions for trespass on land by a railroad company. *Reversed.*

Three actions of trespass *quare clausum fregit* brought by Robert E. Boyd and others, heirs of Clarissa Boyd, against the Baltimore & Ohio R. Co. The first action was brought June 5, 1883, the second November 14, 1883, and the third June 3, 1885.

The declaration in the first suit avers that "the defendant, on various days and times, and frequently, within three years next before the institution of this suit, broke and entered a certain close of the plaintiffs, situated within the city of Baltimore, and ran and drove large cars drawn by locomotives upon and over the same close against the will of the plaintiffs and to their great damage."

The second declaration avers like acts of the defendant, subsequent to the bringing of the first suit, up to the institution of the second.

The third declaration avers like acts, subsequent to the second suit, up to the date of the third.

On a former appeal in the first action, in which a verdict and judgment in favor of plaintiffs was reversed and a new trial granted, (see 63 Md. 325), the facts were stated by the court as follows:

In February, 1851, Mrs. Clarissa Boyd became the owner in fee of a long, narrow lot of ground in the city of Baltimore, fronting about 18 feet on the southwest side of Fort avenue and running back about 1200 feet to the water. Mrs. Boyd died in May, 1871, intestate, leaving her husband surviving her, who consequently became entitled to a life-estate in this lot. The husband died in July, 1881, and this suit was brought by the four children and heirs at law of Mrs. Boyd.

On the 17th of July, 1869, the mayor and the city council of Baltimore passed an ordinance providing for the condemnation and opening of certain streets between Fort avenue and the water, and the line of condemnation crossed this Boyd lot. The ordinance recites that application for its passage was made by the Baltimore & Ohio R.; and one of its conditions was that it was to be inoperative unless, and until, the said company shall enter into an agreement with the city to pay all damages that may be awarded to owners of property, over and above the benefits assessed. On the same day another ordinance was passed, by which the city granted permission to the railroad company to construct and operate a railroad from its Locust Point line, along the beds of the streets so to be condemned and opened, so as to make a connection by water with the Philadelphia, Wilmington & Baltimore R. Proceedings for condemnation were duly had under the first of the above ordinances; and in June, 1871, the company duly paid to the city collector the excess of damages over benefits awarded, amounting to \$6611.98.

In 1872 and 1873 the company constructed its branch road with two tracks in the beds of these streets, and in 1877 laid the third

track. Since their construction these tracks have been used by the company as part of its main line, and at least a dozen trains pass over them daily. The plaintiffs' lot lies in an open meadow, without buildings or inclosures; and but for the construction of the railroad across it, it is in the same condition now as at the time of the condemnation. The tracks of the road are laid at the grade of the street, but the street is graded only to the width of the tracks, about thirty-six feet, so that the space occupied by the road, as it passes through this lot, is eighteen feet and one inch by thirty-six feet.

Under the said condemnation proceedings the sum of \$110 was assessed as damages for that portion of the plaintiffs' lot taken for the bed of this street, and \$1 each as benefits to the portions on either side of the street. The balance of \$108 damages was included in the amount paid by the railroad company to the city, but the city never paid or tendered the same to the owners of the lot; nor was it invested in city stock, as provided by the Act of 1878, chap. 143, until December 14, 1883, after the commencement of the second suit.

Immediately after the filing of the opinion in 63 Md., reversing the judgment and ordering a new trial in the first action, the railroad company proceeded to condemn the land of the plaintiffs, occupied by its tracks, and damages thereunder were assessed at \$350, which was at once paid.

After the decision of the court in the first action, the three actions were tried together and separate verdicts were obtained for \$1306.32, \$312.62, and \$1081.06, respectively. Motions for new trials were overruled, and appeals were taken by the defendant. The plaintiffs also took an appeal from the judgment of \$316.62 in their favor.

Further facts appear from the opinion.

John K. Cowen, W. Irvine Cross, and Hugh L. Bond, Jr., for Baltimore & Ohio R. Co.

Charles J. Bonaparte for Robert E. Boyd *et al.*

ALVEY, J.—The record now before us contains four appeals, three by the defendant from three several judgments against it, and one by the plaintiffs from one of those judgments.

There were three several actions of trespass *quare clausum* *facta*. *git* brought by the plaintiffs below against the defendant, the Baltimore & Ohio R. Co.; and by agreement, the three actions were tried together, but a separate verdict was rendered in each case, and consequently separate judgments were entered.

The first of these cases was here on a former appeal, and is reported in 63 Md. 325. The facts of that case are substantially the facts of all the present cases, so far as the main question on these

appeals is concerned; the only material difference being that the last two cases were brought to cover two successive periods of time. The *locus in quo* in all three of these actions is the same as that described in 63 Md. 330; and the circumstances of the entry upon and user thereof by the defendant are there fully stated. In that case the court having determined that as the defendant's entry upon and user of that portion of the lot of vacant and unimproved ground in the city of Baltimore belonging to the plaintiffs, occupied as a bed for the tracks of its railroad, was unauthorized and therefore a wrong, the plaintiffs were entitled to recover therefor. But in view of the facts then disclosed, this court held that the plaintiffs were not entitled to recover exemplary damages, there being no element of fraud or malice, or evil intent, on the part of the defendant, in entering upon and using the ground as it did.

In the trial of the present cases the main subject of contest was as to the proper measure of damages to be awarded to the plaintiffs. At the request of the plaintiffs, the court granted three prayers as instructions to the jury, as to what damages should be allowed; and at the instance of the defendant two other prayers were granted upon the same subject; but the first prayer offered by the defendant was refused by the court.

The plaintiffs excepted to the instructions given on the request of the defendant, and the latter excepted to the instructions given at the instance of the plaintiffs, and also to the refusal to grant its first prayer.

The rulings upon the prayers are the subjects of the third bill of exceptions taken by the defendant, and of the second bill of exceptions taken by the plaintiffs.

By the first of the instructions for the plaintiffs, the jury were directed that, upon finding the facts enumerated, their verdict in the first case should be for the plaintiffs, "with such damages as would, in the judgment of the jury, amount to a fair compensation for the said unauthorized use of the said tracks." And as applicable to the second and third cases, the jury were directed that, in finding for the plaintiffs, their verdict should be for such an amount as would, "in their judgment, fully compensate the plaintiffs for such continued and unauthorized use of the said tracks, between the dates named, against the wishes of the plaintiffs, and under all the circumstances disclosed by the evidence."

By the first of the defendant's prayers, which was refused, the court was asked to instruct the jury that there was no evidence legally sufficient, from which they could find that there was any substantial damage or injury done to the *locus in quo*, by the acts of the defendant, and therefore the verdict should be for nominal damages only.

The court, however, while refusing to require the jury to find

their verdict for nominal damages merely, did instruct them, by granting the second prayer of the defendant, that if they found from the evidence that no substantial damage or injury was done to the plaintiffs' lot of ground, by any act or user thereof by the defendant, the verdict should be for nominal damages only. We do not understand that there is any question made as to the propriety of granting the defendant's third prayer by the court.

It clearly appears that since the death of Philip D. Boyd, in 1881, who held a life-estate in the premises, the defendant in these cases has been, down to a very recent date, a *tort feasor*, in the use and continual occupancy of the *locus in quo*, as against the heirs at law of Mrs. Clarissa Boyd, deceased, those heirs being plaintiffs in the present actions.

It is true, the original entry into, and the construction and use of railroad tracks over, the *locus in quo*, were all supposed to be authorized by virtue of certain condemnation proceedings had under certain city ordinances for opening of streets, but which proceedings proved to be defective and insufficient to secure to the defendant the right of way over the lot of ground in question. The defendant, therefore, was not a wilful wrong-doer. This was determined by this court in the case reported in 63 Md. 325.

The lot of ground belonging to plaintiffs was, and still remains, uninclosed, and without any improvement thereon whatever, apart from the railroad tracks placed there by the defendant. The space occupied by the road, in passing through this lot, was very small, being only about eighteen by thirty-six feet. The defendant, since the decision of this case on the former appeal, has procured condemnation of the right of way for its road through the lot, and the inquisition has been confirmed; but the present actions were brought for the repeated trespasses on the lot from the time of the death of Philip D. Boyd to the time of the taking of the recent inquisition by the defendant.

That the entry upon and use of the land, although under color of right, and although the ground was uninclosed and vacant, was unlawful and therefore a trespass, admits of no question or dispute; and consequently, for such invasion of their rights the plaintiffs are entitled to recover some damages of the defendant. It is not necessary, in order to entitle the plaintiffs to a verdict, that they should have given affirmative proof that they had sustained any particular amount of damages; for every unauthorized entry upon the land of another is a trespass; and whether the owner suffer substantial injury or not, he at least sustains a legal injury which entitles him to a verdict for some damages, although they may, under some circumstances, be so small as to be merely nominal. *Ashby v. White*, 2 L. Raym. 955;

QUESTION
DAMAGES.

Mellor v. Spateman, 1 Saund. note 2, p. 207, a; *Taylor v. Heniker*, 12 Ad. & El. 448; *Dixon v. Clow*, 24 Wend. 188.

The present cases, however, we think, are not cases for nominal damages merely; for although there is an entire absence of any such element of wanton or malicious motives, or such reckless disregard of the rights of others, in the commission of the trespass, and the repetition thereof, as would entitle the plaintiffs to claim punitive or exemplary damages, yet the strip of ground belonging to the plaintiffs has been continuously and beneficially occupied by the defendant, as the bed of its railroad tracks, since the death of Philip D. Boyd to the time of bringing the last suit; and for such use of the land a reasonable, but a substantial, compensation ought to be paid.

It is true, there is no evidence whatever of any special damages sustained, or that the plaintiffs were hindered or obstructed in any proposed use of their lot, by reason of the presence and use of the railroad tracks; but, nevertheless, we are of opinion that the plaintiffs are entitled to a reasonable compensation for the use of their land, and we think this is measured by what would be a fair rental value for the ground, occupied as it has been, for the time covered by the actions, and nothing more. In such cases as the present, where there is nothing to show that any special damage has been suffered, the principle seems to be established by many respectable authorities, that the plaintiffs are entitled to recover such compensation as the use of the ground was worth, during the time and for the purpose it was occupied. It has been so held in several cases, and we need only refer to *McWilliams v. Morgan*, 75 Ill. 473; *Chicago v. Huenerbein*, 85 Ill. 594; *Ward v. Warner*, 8 Mich. 508.

And although the facts are somewhat different, the same principle of compensation was adopted in the cases of *Blesch v. Chicago, etc., R. Co.*, 43 Wis. 183; *Carl v. Sheboygan, etc., R. Co.*, 46 Wis. 625.

Such, then, being the proper rule of damages in these cases, the instructions, given at the request of the plaintiffs, were not sufficiently definite, and were well calculated to mislead the jury. They were certainly susceptible of a construction that would permit the jury to transcend the fair rental value of the piece of ground, occupied by the defendant, as the measure of compensation to be allowed; and that such was the understanding or interpretation of these instructions by the plaintiffs' counsel is made manifest by the arguments and illustrations urged by him while addressing the jury, as reported and set out in the defendant's fourth and fifth bills of exception. We are, therefore, of opinion that there was error in granting these instructions in the terms therein employed, and that there was also error in granting the second prayer

of the defendant, but no error in refusing the first, or in granting the third, of the defendant's prayers.

In the view we have stated of the measure of recovery in these cases, the questions of evidence raised by the first and second bills of exception taken by the defendant become quite immaterial; and it is unnecessary to express any opinion in regard to them.

With respect to the fourth and fifth exceptions taken by the defendant, they present a question of practice as to the right and duty of the trial judge to interpose to restrain counsel, who is alleged to be indulging in argument and illustrations before the jury, unwarranted by the instructions of the court, and which will, if unrestrained, likely mislead the jury in the finding of their verdict. This is a matter that must, in the nature of things, rest largely in the discretion of the trial court.

DUTY OF COURT
TO RESTRAIN
COUNSEL IN AR-
GUMENT.

It is, however, proper for us to say that no duty incumbent upon the judge of a trial court is more imperative, or more important to the fair and orderly administration of justice, than that of interposing to restrain everything in the course of the trial that tends to mislead the jury and to divert their minds from the strict line of inquiry with which they are charged.

It is the function and duty of the court, when called upon in the trial of civil cases, by either of the parties, to instruct the jury as to the principles of law applicable to the case on trial; and it is the duty of the jury to observe and conform to such instruction. Counsel can never be permitted to argue to the jury against the instruction of the court, or to indulge in any line of argument or comment that would tend to induce them to disregard the instructions given for their government. This is a matter that is always within the control of the court. *Sowerwein v. Jones*, 7 Gill. & J. 335; *Bell v. State*, 57 Md. 120.

DUTY OF THE
COURT IN IN-
STRUCTING THE
JURY.

When, however, the instructions given are ambiguous, or susceptible of different interpretations, and the attention of the court is called thereto, no matter at what stage of the trial, if before the jury have acted thereon, it at once becomes the duty of the court to remove the ambiguity, and to make the meaning of the court plain.

Here, as we have shown, the instructions were indefinite, and were, to some extent at least, open to the construction that was being placed thereon by the counsel of the plaintiffs when he was interrupted by the adverse counsel, and the court's attention called to what he was contending for before the jury, as set forth in the fifth exception. The counsel was not restricted in his contention by any affirmative action of the court; and we infer, from such non-action, that the counsel, in urging the allowance of a large and

discretionary amount of damages, was, in the opinion of the court, conforming his contention to the instructions given the jury. We have said that the instructions were erroneously granted; and whether or not they were rightly construed in argument before the jury is a question quite immaterial to be decided for the retrial of the cases.

There were two bills of exception taken by the plaintiffs. The first was taken to the refusal by the court to admit as evidence, to prove malice on the part of the defendant, certain declarations or statements made by counsel on a former occasion, in the course of a trial, and while arguing the question of the damages before a jury of condemnation of the property in question. We know of no principle or authority, and have been referred to none, upon which such declarations of counsel as those here offered could be admitted for the purpose indicated. We, therefore, think the court was clearly right in excluding them.

EVIDENCE OF
MALICE—DECLA-
RATIONS OF
COUNSEL ON A
FORMER TRIAL.

The second exception taken by the plaintiffs was to the granting by the court of the second and third prayers of the defendant. As to the second prayer, thus excepted to, we have said there was error; but as to the third, there was no error, and therefore no ground for the exception to that instruction.

It follows that the several judgments entered in these cases must be reversed, and a new trial ordered.

When Proceedings to Condemn are Ineffectual—Entry is a Trespass.—
Rusch v. Milwaukee, etc., R. Co., 6 Am. & Eng. R. R. Cas. 609. See notes on the subject of actions of trespass against railroad companies for entering upon lands and using the same without due process of law, 10 Am. & Eng. R. R. Cas. 48; 14 Ib. 225; 14 Ib. 232; 20 Ib. 267.

BRADLEY

v.

MISSOURI PACIFIC R. Co.

(*Advance Case, Missouri. March 21, 1887.*)

Right of a wife who signs a deed with her husband attempting to convey her property, but whose name does not appear in the body of it, to maintain ejectment against the grantee.

Under the Missouri constitution the taking of private property for public use without compensation is prohibited. A statute of that State authorizes the appropriation of private property to public use, and provides for the

assessment of damages, contemplating that the railroad company will take the initiatory steps therefor. *Held*, that property can only be taken by pursuing the provisions of the law, and where the company does not take the initiatory steps for the appropriation of land, it cannot rightfully hold the property until the damages are assessed and paid; and ejectment is the proper remedy.

At the time of the death of the husband and wife, they had resided in the State of California for a long time, and the plaintiffs, the heirs of the wife, are non-residents. In an action of ejectment by them the company set up as a defence the fact that they had mortgaged the property, and therefore the plaintiffs were estopped to maintain the action. *Held*, that as there was no proof that any of the plaintiffs knew that the company was executing mortgages upon the property, no estoppel could be interposed against them.

APPEAL from a judgment of the circuit court of Pettis county rendered against defendant in an action of ejectment. Affirmed.

The facts are stated in the opinion.

William S. Shirk and Thomas G. Portis, with Thomas J. Portis, for appellant.

George P. B. Jackser for respondents.

BLACK, J.—This is an action of ejectment. The land sued for is used and occupied by the defendant as a right of way, and for side-tracks and depot purposes at Smithton Station, in Pettis county. The 80 acres, of which the land in question is a part, was patented to Lucy A. Price. In 1853 her husband, Argillon Price, conveyed the same to Edwards, who conveyed the same to Combs in 1857, and the latter conveyed the land in question to the Pacific R. Co. in 1860; and by virtue of various deeds the defendant has acquired the title of that company. Edwards and Combs had continuous possession of the 80 acres, under their deeds, from 1853 to 1860. At the latter date the Pacific R. Co. took possession of the land in question, and it and those claiming under it have ever since used and possessed the property for the purposes before stated. Argillon Price died in April, 1875; Lucy A., his widow, died in April, 1877. The plaintiffs are their heirs, and this suit was begun in December, 1881.

1. The ground of this controversy lies in the fact that the deed to Edwards purports to be the deed of Argillon Price only. The name of Lucy A. Price does not appear in the body of it, nor is there anything in the body of the deed to show that he was a married man. It concludes: "In testimony whereof I have hereunto set my hand and seal," etc. The deed, however, is signed by her and her husband, and acknowledged by her on the 22d of July, 1853, and by him on the 14th of September, 1853. The wife, as will be seen, owned the property in her own right; and the fact that she signed her name to the deed and acknowledged it before a proper officer does not

WIFE SIGNING
DEED NOT SUFFICIENT.

make it her grant. The party in whom the title is vested must use appropriate words to convey the estate. Signing, sealing, and acknowledging a deed by the wife, in which her husband is the only grantor, will not convey her estate. *Whiteley v. Stewart*, 63 Mo. 360; *Agricultural Bank v. Rice*, 4 How. 225; *Cincinnati v. Lessee of Newell's Heirs*, 7 Ohio St. 37. Whether it would be sufficient to release her dower in her husband's estate we do not determine.

2. This deed was made prior to the passage of the statute which now appears in Rev. Stat. 1879, § 3295, and the effect of the deed must therefore be determined without regard to that statute. Mr. Price was a tenant by the curtesy, and though the deed was ineffectual to convey the estate of his wife, still it operated as a conveyance of his life-estate. *Reaume v. Chambers*, 22 Mo. 36; *Beal v. Harmon*, 38 Mo. 435; *Allen v. Ransom*, 44 Mo. 266.

STATUTE OF
LIMITATIONS NOT
A BAR.

Although the defendant, and those under whom it claimed, have had actual possession since 1853, a period of nearly twenty-eight years, still that possession commenced with the date of the deed of Mr. Price, which, as we have seen, conveyed his life-estate. During his life Mrs. Price could not have maintained an action for the possession of the property. *Reaume v. Chambers*, *supra*; *Miller v. Bledsoe*, 61 Mo. 96; *Roberts v. Nelson*, 87 Mo. 229. No cause of action accrued to her until her husband's death, and until that event the statute of limitations did not commence to run against her or her heirs. *Dyer v. Brannock*, 66 Mo. 391; *Dyer v. Whittler*, 4 West. Rep. 672. He died in 1875, and the statute commenced to run at that time; but the period of ten years did not elapse between that date and the commencement of this suit, so that it is clear that the statute of limitations constitutes no defence to this action.

3. The further point is made that, inasmuch as the Pacific R. Co. acquired the right to construct its road on the land, having done so, ejectment will not lie, and the plaintiff must resort to some other proceeding to secure compensation for the land thus used for railroad purposes. In *Kanaga v. St. Louis, L. & W. R. Co.*, 76 Mo. 207, the land was the general property of the wife. It was there held that if the husband had acted in a manner to estop him from asserting his right to the possession of the land upon which the road had been built, then she was also estopped. But that case is not an authority here. First, because the suit was prosecuted during the life of the husband, and what right the wife or her heirs might have after the death of the husband was not before the court and not considered. Second, because that case, in so far as it holds the wife estopped by the acts *in pais* of the husband, is overruled by *Mueller v.*

EJECTMENT THE
PROPER REMEDY.

Kaessmann, 84 Mo. 318. In this respect the Kanaga case was ruled to be in conflict with the statute before mentioned, and by which the rights of the wife there were to be determined. Third, where the owner of land, it has been held, does not insist upon prepayment of the damages or other considerations for the right of way, but by his acquiescence or license induces or permits the company to take possession and construct the road, he cannot maintain ejectment thereafter for the land, because of a failure to pay the damages or other considerations. *Prevolt v. Chicago, R. I. & P. R. Co.*, 57 Mo. 256; *Baker v. Same*, 57 Mo. 265. But clearly these cases are not in point here. It was the owner, who permitted or induced the company to construct its road in advance of payment, who was denied right to recover in ejectment. Here Mrs. Price had no right or power to object. She could assert no rights as against the company until the expiration of her husband's life-estate. In *Walker v. Chicago, R. I. & P. R. Co.*, 57 Mo. 275, it was held that if the company proceed to build the road upon land to which it had not acquired the requisite title by condemnation, or by a conveyance from the owner, or by permission from him, it would be liable to be ousted by ejectment. Where the company enters without right, mere inaction on the part of the owner, it was said, could not be tortured into an acquiescence or license for the company to proceed, though he was informed that the company had entered for the purpose of constructing its road. So an action of ejectment will lie against a city for land wrongfully taken by it, and converted into a street, and improved and used as such. *Armstrong v. St. Louis*, 69 Mo. 309.

In *Chicago & A. R. Co. v. Smith*, 78 Ill. 98, the owner of a life-estate had been notified of the appointment of commissioners to assess damages; but the notice was not sufficient as to the remaindermen, and it was held that they might, at the expiration of the life-estate, and after demand made for the premises, recover in ejectment.

We are cited by appellant to *Austin v. Rutland R. Co.*, 45 Vt. 238. That was an action of ejectment by remaindermen to recover property previously used for railroad purposes. The company had acquired the life-estate and constructed their road on the property, but there had been no appraisal or payment of damages to the plaintiff. The action, it was held, could not be maintained. Considerable stress was placed upon a statute of that State, and in respect of which the court says: "This seems to contemplate that the company might have two years after such entry, taking possession, and using, in which to get such damages appraised, pursuant to the provisions of § 17; and it seems difficult to suppose that it was contemplated at the time that, in the mean time, they should be liable to be ousted by action of ejectment." We have no such

statute in this State. Our constitution prohibits the taking of private property for public use without just compensation. Under such a provision and our statutes with respect to the condemnation of the property, it was held, at an early day, that the company could not enter for the purpose of constructing the road until the damages were paid or secured to the owner. *Walther v. Warner*, 25 Mo. 277. The Vermont case has other features which distinguish it from the present one, but enough has been said to show its inapplicability here. Indeed, the judgment there is made to stand upon the peculiar features of the case then before the court.

Our statute, which authorizes the appropriation of private property to public use and provides for the assessment of damages, contemplates that the company will take the initiatory steps therefor. The property can only be taken by pursuing the provisions of the law. In this case the state of the title was known, or might have been known, by an examination of the recorded deeds when the road was first constructed. The interest of these plaintiffs, derived from their mother, might have been condemned at that time. As this was not done, the defendant cannot rightfully hold on to the property until the damages are assessed and paid to or into court for the plaintiffs; and ejectment is the proper remedy.

4. The record shows that the railroad property was sold under foreclosure of a mortgage in 1875, and through Baker this defendant became the purchaser. Since that, this and several other companies were consolidated, and the entire property has been mortgaged for large sums of money,—perhaps to its entire value. But these facts constitute no estoppel as against Mrs. Price. At the time of her and her husband's death, and for a long time prior thereto, they resided in the State of California, and the plaintiffs, it would seem, are non-residents. There is no evidence that they or any of them encouraged or knew of the doing of these things relied upon as an estoppel. The large debt upon the property shows that the present suit is the practical remedy to pursue.

NO ESTOPPEL
AGAINST MRS.
PRICE.

The judgment of the circuit court is therefore affirmed.

All concur.

Ejectment against Railroad entering on Land without Condemnation.—
See *Jones v. New Orleans & Selma R. Co.*, and note, 14 Am. & Eng. R. R. Cas. 217, 225.

WATTEMEYER
v.
WISCONSIN, IOWA AND NEBRASKA R. CO.

(*Advance Case, Iowa. June 9, 1887.*)

A person claiming damages of a railroad company for taking and using land outside of that condemned for its right of way, whereby a permanent injury to the freehold was caused, must prove an absolute freehold title in himself, and not merely possession, as in the case of trespass to a possessory right.

Where a plaintiff alleges damages by a railroad company to 160 acres of land, he cannot prove damages to the entire 240 acres of his farm.

Unless a railroad company is proved to have authorized and assented to a trespass by a sub-contractor in appropriating uncondemned land, it will not be held liable.

APPEAL from district court, Hardin county.

The plaintiff averred in his petition that he was the unqualified owner of 160 acres of land, and that the defendant railway company condemned 100 feet in width through said land for right of way for its railroad; and that, in constructing the said railroad, defendant entered upon plaintiff's land on each side of said right of way, and took strips of land outside the right of way 50 feet wide by 200 feet long, without any authority from plaintiff, and removed the earth from said strips without condemning the same, and destroyed a spring of water belonging to the plaintiff, and he claimed damages in the sum of \$500. The defendant by its answer denied each and every allegation in the petition. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

Hubbard, Clark & Dawley for appellant.

John H. Bradley, and Sutton & Childs for appellee.

ROTHROCK, J.—1. The plaintiff averred in his petition that he was the absolute owner of the land. His action was not brought to recover damages to a mere possessory right. The court instructed the jury that it was incumbent on him to prove that he was the owner of the land. The appellant insists that there was no proper evidence of ownership, and we think this position must be sustained. It is true, some of the witnesses, in giving their testimony, referred to the land as plaintiff's farm, but this was merely descriptive of the land. Indeed,

**PLAINTIFF MUST
PROVE AN ABSO-
LUTE OWNER-
SHIP.**

there was no attempt on the part of the plaintiff to prove title in the ordinary and usual way. The proceedings in condemning the 100 feet in width were introduced in evidence, but were not admitted for the purpose of showing title in the plaintiff. Even if they were introduced for that purpose, they do not show title. The report of the commissioners show that the damages awarded are to be paid to the owners of the land "as their interests may appear." It is claimed by counsel for the plaintiff that, the action being in trespass, possession was sufficient without proof of title. But the instruction given by the court to the jury was the law of the case, and under it the plaintiff was bound to show that he was the owner of the land; and we think this view of the case was correct, because the plaintiff sought a recovery not to a mere possessory right, but for a permanent injury to the freehold; and the court instructed the jury, upon this theory, that the taking of the strips of land on each side of the right of way was a permanent appropriation thereof, and the right of the defendant to fence the land thus appropriated is recognized in the fourth instruction. That an action of this kind, founded upon the ownership of the land, may be maintained, see *O'Hagan v. Clinesmith*, 24 Iowa, 251; *Brown v. Bridges*, 31 Iowa, 145; *McCormick v. Railroad Co.*, 47 Iowa, 347.

2. The plaintiff described his land in his petition as being a tract of 160 acres. In his evidence he described it as a farm of 240 acres, and he was permitted, against the objection of the defendant, to show that the farm of 240 acres was damaged by the alleged trespass at a certain rate per acre. This was plainly erroneous. The plaintiff did not bring his action for damages done to a farm of 240 acres.

SIZE OF FARM—
EXTENT AND
PROOF.

3. As the cause must be reversed for these reasons, we might dispose of the case, so far as this appeal is concerned, without further consideration. But, in view of a new trial, it is proper that we should briefly consider another alleged error which more nearly affects the merits of the case. The evidence shows that there is quite an embankment on the line of road at the point in question, and that, in constructing this embankment, the earth outside of the right of way, on both sides thereof, was dug up and used in making the embankment. The work was done by sub-contractors, and the defendant claims that it is not liable for the wrongful acts of its contractors, unless such wrongful acts were done by its direction. Upon this phase of the case, the court instructed the jury as follows: "The defendant had the right to condemn extra width of ground beyond one hundred feet, if necessary for excavation or embankment in making its road-bed as a part of its right of way. If it was so necessary to take the additional part of the plaintiff's land for the pur-

COMPANY NOT
LIABLE FOR
WRONGS OF SUB-
CONTRACTOR.

pose of embankment, and it was taken without condemnation, the act of taking it was a trespass, and it is not material to determine whether the persons who did the act in person were contractors or sub-contractors, or the employees of sub-contractors; they will in law be considered the agents or servants of the defendant, and it will be liable to the plaintiff for whatever injury was directly caused by the act of taking. In other words, the defendant is liable for whatever injury was directly committed by any one acting in its interest in building the road, for taking whatever ground was reasonably necessary to be used for its right of way which was not condemned for that purpose."

We think this instruction cannot be sustained. It puts a mere sub-contractor in the place of the company, and authorizes him to determine the question whether the act complained of was necessary to the construction of the embankment. And the evidence does not show that it was necessary to take the earth from outside the right of way. As we read the evidence, earth could have been obtained, for all the purposes required, without making an unreasonable haul. Now, if the sub-contractor had no authority from his principal to trespass outside the right of way, and he wilfully did so without the assent of the company, the latter is not liable for his wilful trespass. We do not determine the evidence necessary to establish such assent. It appears that stakes were set at the outer edge of the land taken, and these stakes were similar to the grade stakes used on the line, and had marks and figures upon them. If these stakes were set under the direction of an engineer of construction, that fact would be competent evidence upon the question as to the assent of the company. It must be made to appear in some way that the company assented to the trespass, or had such knowledge of it, at the time before it was done, as that assent might be presumed therefrom. Upon this point, see *Steel v. Southeastern R. Co.*, 16 C. B. 549; *Eaton v. Railway Co.*, 59 Me. 520; *Hughes v. Railway Co.*, 39 Ohio St. 461; s. c., 15 Am. & Eng. R. R. Cas. 100.

Reversed.

Liability of Company for Trespasses Committed by Contractor in Building Road.—See *Hughes v. Cincinnati & Springfield R. Co.*, and note, 15 Am. & Eng. R. R. Cas. 100-110; *New Orleans, etc. R. Co. v. Reese*, 18 Ib. 110; *Pound v. Port Huron, etc., R. Co.*, 19 Ib. 640; *Edmundson v. Pittsburgh, etc., R. Co.*, 23 Ib. 433; Note to *Hitte v. Republican Valley R. Co.*, 29 Ib. 589.

CHICAGO, IOWA AND KANSAS R. Co.

v.

KNUFFKE.

(Advance Case, Kansas. April 8, 1887.)

Where a railroad company instituted proceedings to appropriate a strip of land for its use in building a railroad, and the commissioners appointed upon its application condemned a city lot upon which buildings of a permanent character were standing and attached, and in their report stated that the value of the buildings was included in the award made, and the owner appealed from the award, but afterwards accepted from the company the amount of the award, and dismissed his appeal, *held*, that the buildings passed with the land, and that the action of the owner in dismissing the appeal, and accepting the amount of the award, which upon its face included the value of the buildings, estops him from claiming the possession of the buildings, or from removing them from the land appropriated.

ERROR from Washington county.

W. W. Guthrie, J. W. Deweese, and Lowe & Smith for plaintiff in error.

A. S. Wilson and J. A. Broughten for defendant in error.

JOHNSTON, J.—The Chicago, Iowa & Kansas R. Co. instituted proceedings to condemn a right of way through Washington county, upon which to construct and operate its road. The commissioners appointed for that purpose laid out a right of way through the city of Hanover, and condemned a strip of land 100 feet wide over a lot situate in that city owned by John Knuffke, upon which certain buildings were attached and standing. In the report filed by the commissioners, it is stated that the lot was taken for the right of way of the railroad, and they add: "And we do appraise the value of said lot so taken, and the buildings and appurtenances thereto belonging, and assess the damages to the owner thereof, at the sum of \$2100." The defendant, Knuffke, appealed from the award of the commissioners, but afterwards he accepted the amount awarded, which had been placed on deposit with the county treasurer, and at a later time he dismissed his appeal. After the defendant had accepted the condemnation money, and had given a receipt to the county treasurer therefor, he tore down and removed the buildings which were upon the lot appropriated by the railroad company, claiming that they were not included with the land condemned, and the present

action was brought to recover the possession of the buildings and material. In addition to the facts stated, it was shown at the trial that the commissioners, in making their award, considered the whole lot together, with the buildings and improvements thereon. They valued the ground at \$1400, and the buildings and improvements at \$700, and these two items together constituted the award of \$2100, which was made and accepted. There was testimony in regard to the permanent character of the buildings, and their value, and also of the demand made by the plaintiffs for the return of the property. A demurrer to the plaintiff's evidence was sustained, which was followed by a judgment for the defendant, and the plaintiff has brought the case here for review.

The question presented for decision is whether the buildings which were situate on the lot passed from the defendant to the plaintiff by the condemnation award, and its acceptance by the defendant while the buildings were standing thereon. The statute under which the commissioners were appointed

WHETHER BUILDINGS PASSED WITH LAND.

delegates to them power to lay off a right of way for a proposed railroad, and to condemn so much land as may be deemed necessary for the purposes of the road. The condemnation proceedings give the railroad company a right to occupy the land condemned for the purposes necessary to its construction and use, and when the road is constructed, the perpetual use of the land is vested in the company. Authority is given to appropriate land, and that term is sufficiently broad to include buildings of a permanent and fixed character, such as those in question here. Mills Em. Dom. §§ 49, 223. We have no statute, as they have in some of the States, exempting houses and other structures from being appropriated for public use, or permitting the owner to remove them from land that has been condemned. On the other hand, our statute proceeds upon the theory that the railroad company appropriating the land acquires a right to the buildings thereon, and becomes liable to the owner for the value of the same. In the statute relating to corporations, it is provided that an appeal shall be had from the determination of the commissioners, not only as to the value of the land, but also as to the value of the buildings and improvements on the land. Gen. St. c. 23, § 86. This provision presupposes that the buildings are to be appraised by the commissioners. They are to award the owner not the damage done to the buildings by their removal, but are to allow him the full value of such buildings. The determination of the commissioners includes the value of the buildings, as well as of the ground upon which they stand, and, until compensation for both is made or secured by a deposit of money, the company cannot take possession of the land, or acquire any right therein, without the consent of the owner. While the buildings and material in question

are not an absolute necessity in the construction and use of the road, they are of such a character that they may and can well be used by the company in building and operating its road. By agreement of the parties, the buildings and other improvements on the land taken might have been excepted from the award, and retained by the land-owner. Instead of making such an exception, the conduct of the defendant was such as to conclude him from asserting any claim to the possession of the buildings. They were specifically mentioned in the report of the commissioners; and, by the terms of the report, the value of the buildings was included in the amount awarded to the defendant. In taking an appeal from the award, he waived any question as to the regularity of the proceedings; and by accepting the award, which upon its face included the value of the buildings, he is now estopped from setting up any claim or right of possession to them. *Challis v. Railroad Co.*, 16 Kan. 117; *Atchison, T. & S. F. R. Co. v. Patch*, 28 Kan. 470; *Dodge v. Burns*, 6 Wis. 514; *Mills Em. Dom.* § 329. He is entitled to just compensation for what is taken, but he cannot take the full value of the buildings, and retain them too. The railroad company was entitled to the property appropriated, and for which it had paid. The buildings were subject to condemnation, were condemned, and, since the defendant has accepted full and just compensation for the buildings, he cannot now be permitted to claim or remove them.

It follows that the court erred in sustaining the demurrer to the evidence, and the judgment will therefore be reversed, and the cause remanded for another trial.

All the justices concurring.

Receipt of Damages by Land-owner Waives Irregularities in Condemnation Proceedings.—After the land-owner has accepted the damages awarded for the taking of his land, he is estopped from contesting the validity of the proceedings. *Karber v. Nellis*, 22 Wis. 215; *Felch v. Gilman*, 22 Vt. 38; *Hawley v. Harrall*, 19 Conn. 142; *Town v. Town of Blackberry*, 19 Ill. 137; *Rees v. Chicago*, 38 Ill. 322; *Kile v. Town of Yellowhead*, 80 Ill. 208.

The land-owner's receipt of the damages is evidence of his assent to the proceedings. *Embury v. Conner*, 3 N. Y. 511.

In *Dodge v. Burns*, 6 Wis. 514, the land-owner obtained judgment for the value of the lands taken by the railroad company, and received from the company the amount of such judgment. He afterwards brought an action of trespass against the company for illegally entering upon his land. *Held*, that he was estopped from setting up any claim to the possession of the lands so long as they were used by the company for the purposes mentioned in its charter.

In *Hitchcock v. Danbury & Norwalk R. Co.*, 25 Conn. 516, the plaintiff, whose land had been taken by the railroad company, received the damages therefor, and for two years thereafter allowed the company, without objection, to occupy the land for their road and expend money in improvements upon it. At the end of that time he brought an action of trespass against the company, claiming that their proceedings were irregular and conferred

no right to make the entry. *Held*, that by receiving the money plaintiff had waived all right to object to the irregularity of such proceedings. So in *Whittlesey v. Hartford, etc., R. Co.*, 23 Conn. 421, the assessed damages had been taken and kept, and the company had had possession of the road for a considerable time. *Held*, that plaintiff was estopped from objecting to the informality of the proceedings.

Receipt of Damages Waives Right to Appeal.—By accepting from the railroad company the amount of the damages awarded to him, the landowner waives his right to appeal. *The Mississippi & Missouri R. Co. v. Byington*, 14 Iowa, 572.

Buildings on Land Condemned.—Taking for a way land already used for that purpose, takes all things existing upon it and adapted to its use as a way, such as flagstones, gravel, bridges, culverts, etc., so that the appraisal, in such case, should be of the land with all these incidents of its condition. *Ford v. County Commissioners*, 64 Me. 408; *Central Bridge Corporation v. Lowell*, 15 Gray (Mass.), 110.

Damages for the soil and a structure thereon, taken for a highway, should not be separately estimated. *Ford v. County Commissioners*, 64 Me. 408.

Buildings of a permanent character are part and parcel of the freehold, and pass from the owner to another or to the public, in all ordinary transfers, either voluntary or coercive, as the land itself passes, and as a part thereof. *Bennett v. Boyle*, 40 Barb. (N. Y.) 551.

In *Hollingsworth v. Des Moines & St. Louis R. Co.*, 63 Iowa, 443; s. c., 17 Am. & Eng. R. R. Cas. 113, between the time the land was appropriated and the case was tried, the railroad company sold the buildings on the land to third parties who removed them. *Held*, that the company could not afterwards be permitted to say that the buildings remained the property of plaintiffs, in order to have their value deducted from the market value of the property in assessing the damages. The court, however, in this case say: "It may be true, as defendant claims, that a building standing on land condemned under the statute for right of way, or the material in it, except such as may be required in the construction or repair of the railway, remains the property of the land-owner. But we think we are not required to determine that question in this case." But in *The Lafayette, etc., R. Co. v. Winslow*, 66 Ill. 219, the appellants contended that the value of the buildings destroyed by them should not be charged against them, as they did not by the condemnation proceedings become the owner thereof. *Held*, that they were liable for the value of the buildings. Breese, J., said: "If a building stands in the way of the road which it is necessary to destroy, its value must be paid by the corporation, and the jury, in estimating its value, will take into consideration not the value of the materials composing the building, but the value of the building as such. Should any of the *debris* remaining on its removal or destruction be appropriated by the owner of the land, to the extent of its value will the claim of the owner be lessened."

In the Matter of Widening Wall St., 17 Barb. (N. Y.) 617, the commissioners made a report allowing to the Bank of the Republic the value of the *land* taken from it for widening the street, but allowed nothing for damages to the *building*, on the ground that it had been erected after the passage of the resolution for widening the street. *Held*, that the report was erroneous, and that the bank was entitled to compensation for damages to the building.

After the land is condemned, the former owner has no right to remove any of the property thereon, and will be liable to an action of trespass for so doing. *Mississippi River Bridge Co. v. Ring*, 58 Mo. 491.

By the Revised Statutes of Maine, the owners of lands taken are allowed one year after the proceedings are finally closed to take off timber, wood, or any erection thereon. See *Ford v. County Commissioners*, 64 Me. 408.

BURLINGTON AND COLORADO R. Co.

v.

SCHWEIKART.

(Advance Case, Colorado. June 15, 1887.)

The plaintiff railroad company sought to condemn a right of way across a narrow strip of land owned and used by the defendant as the only access to his premises. For the purpose of providing the defendant with other means of access the company obtained a grant of another strip of land leading to the premises, and offered the same to the defendant as a right of way. After the commissioners had assessed the defendant's damages, the company alleged that the agreement granting the right of way to the land-owner had not been considered by the commissioners in making their report. The agreement was only a few months old, had not been recorded nor in any way brought to the attention of the public, nor had there been any use of the way by the public. *Held*:

1. That the agreement did not result in the establishment of a public way such as could benefit the owner.

2. That the agreement did not result in the creation of an easement in favor of the land of the defendant.

The constitution of Colorado (article 2, § 15) and the eminent domain act (Code Civil Proc. 74) contemplate a compensation in money to one whose lands are condemned for railroad purposes, and therefore, being inadmissible to reduce his compensation, the commissioners had no power to consider the agreement. The acceptance of such privilege cannot be compelled, but depends on the consent of the parties.

APPEAL from district court, Arapahoe county.

This is an appeal from a decree made December 9, 1882, by the district court of the second judicial district sitting within and for the county of Arapahoe, in a proceeding instituted by appellant to condemn the lands of appellee for railroad purposes. The appellant is a body corporate created for the purpose of constructing and operating a railroad from Denver to the boundary line between the States of Colorado and Nebraska. The appellee is the owner of a tract of land containing about 13 acres lying northerly of the appellant's main line, and east and just beyond that portion of the city of Denver known as Elyria. Upon these premises appellee has a house and some other buildings. Near and in the vicinity of the house there is a small park and two natural lakes, and it is claimed that these and other attractions make the property valuable as a place of public resort. Before this proceeding was begun there was no access to this tract of land from any public highway or street. The adjoining lands were either a part of the public

domain, or the fee was vested in individual proprietors subject to no way or easement for appellee's benefit. To obviate this difficulty, appellee had purchased a strip of land 1300 feet or more in length, and about 20 feet in width. This strip of land ran along or near the southerly line of the S. E. $\frac{1}{4}$ of section 14, township 3 S., of range 68 W. of the sixth principal meridian, to the corner of said section 14; and thence at right angles along the westerly line of said quarter-section to a county road. By means of this strip appellee had access from his premises to a highway. Appellant's main line crosses this strip about 1000 feet from appellee's premises, and this proceeding was instituted to condemn the small fraction of an acre (sixty-five thousandths) thus taken. At the point of intersection between the railroad and this strip of land there is a cut about 12 feet in depth. To use this strip as a way would require a considerable outlay, as it would be necessary either to construct a bridge, or, by excavating, to cross appellant's road-bed at grade.

It was claimed that, for the purpose of providing appellee a means of access to his premises, and thereby removing any inconvenience suffered by him by crossing his intended way, appellant had obtained a grant of a strip of land 50 feet in width, which ran from the entrance to appellee's premises, in a straight line, to a public and travelled street of the city of Denver, and that the means of ingress and egress thus provided to appellee was preferable to the narrow way which he had purchased, for the reasons that it was 30 feet wider, shorter by several hundred feet, and connected with a public street at a point very much nearer the city.

The alleged grant is as follows:

"That the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned to be done, kept and performed by the said party of the second part, hereby grants, with said party of the second part, his successors and assigns, a right of way for the use of the party of the first part, any and all persons, as a public highway," the following-described parcels of land: Beginning, etc., (description of land)—to have and to hold the same for the uses and purposes aforesaid. "And the said the Burlington & Colorado R. Co. hereby agrees to and with said first party to grade said parcels as a highway, so that there shall be a gradual slope from the one hundred feet strip in width upon the line of the Burlington & Colorado R., either way, to the extremities of the parcels aforesaid, and to make a good and sufficient roadway across said one hundred feet strip.

"In witness whereof," etc. JOHN A. CLOUGH. [Seal.]

"J. B. WESTON, [Seal.]

"Special Agent of the Burlington & Colorado R. Co."

This instrument was introduced by appellant, and read in evidence before the commissioners, to be by them considered in determining the question whether appellee's premises were injured by crossing his proposed private way.

The commissioners reported (1) that the land above described to be taken by plaintiff as aforesaid, and which was owned by defendant, is of the value of \$31.50; (2) that the damage which results from the construction of said road, and the taking of said parcel of land by plaintiff to the residue of the land of the defendant from which said parcel is taken, is \$919.50; (3) that there is no benefit to the defendant in the premises, and we therefore report none.

Upon the coming in of this report a motion was filed in behalf of the appellant to set the same aside for the following among other reasons: (1) That said certificate of ascertainment and assessment was made by the commissioners aforesaid under a misapprehension of the law and the facts, in this, to wit: that the said commissioners, and each of them, supposed, at the time when they were deciding on the award to be made in the proceedings herein, that the roadway which it had been testified the petitioner had offered to defendant was not one which defendant could freely use, when in truth and in fact said roadway had been deeded by one John A. Clough to petitioner and its assigns for the use of the public as a highway, and the fact that it had been so deeded was in evidence before said commissioners, and when it was further in evidence that defendant knew of such conveyance long before the beginning of these proceedings.

The report of the commissioners was accompanied by the evidence taken upon the hearing before them. Upon the hearing of the motion to set aside the report the evidence in the cause was presented to the court, and petitioner, by its counsel, offered the testimony of George C. Roberts and George D. Norton, Jr., being two of the commissioners who made the same, to prove that the said board of commissioners had, through and by error and mistake, proceeded upon erroneous and illegal principles in making their said report and the award therein contained, in this, to wit: that said commissioners did not consider, in making their said award and certificate, the agreement to convey to petitioner a strip of land to be taken, which said agreement was entered into between said petitioner and one John A. Clough, and is attached to the testimony, as hereinbefore appears, nor the offer made by petitioners to defendant of the use of said strip, but that the said commissioners rejected the same, and did not consider either said agreement or said offer in making their said award; and that said commissioners did not consider, in determining upon the amount of their said award, the fact that, by the terms of the agreement aforesaid, there

was provided for defendant a road which would render unnecessary any expenditure by defendant in making any excavations as set out in the evidence of defendant hereinbefore fully set forth; and to further prove, by the testimony of said Roberts and Norton, that the award in said certificate contained was for an amount much larger than the said commissioners would have agreed upon had they proceeded upon correct and legal principles in their determination of the matters to them presented, to wit, the damages to be sustained by defendant by reason of the taking of the lands in the petition herein described. Objection was interposed to the introduction of this testimony by appellee's counsel, and objection was sustained, and evidence excluded.

Edward O. Wolcott for appellant.

H. E. Luthe for appellees.

ELBERT, J.—Whether the existence of a public highway, affording ingress and egress to and from the premises of the defendant, would have been a fact to be considered by the commissioners in estimating the defendant's damages resulting from the destruction of his private way by the appellant company, is an inquiry we need not enter upon. We are of the opinion that no such public way existed. It is not claimed that the agreement between Clough and the appellant company resulted in the establishment of a public way under the statute concerning highways in force at the date of the agreement. Gen. Laws, § 2375. This statute deals only with highways established in accordance with law. Nor can it be said that the agreement in question resulted in the establishment of a public way by dedication. In such case, acceptance by the public is as essential as appropriation by the owner of the fee. Ang. Highw. § 157. The agreement bears date January 20, 1882, and was offered in evidence before the commissioners June 29, 1882. It does not appear to have been recorded, or in any other way brought to the attention or knowledge of the public, nor had there been any use of the premises as a way by the public. So far as the public at large was concerned, it was an unknown and unaccepted appropriation. The agreement appears to have remained in the possession and under the control of the appellant company, and was subject to surrender and cancellation by the parties thereto. Washb. Easem. 139, and cases cited. Nor can it be said that, by virtue of the agreement, an easement attached as appurtenant to the estate of the appellee. Such an easement lies only in grant, or by implication of grant, or by prescription which supposes a grant by the owner of a servient estate, upon which the obligation rests, to the owner of a dominant estate, to which the right belongs. A parol license is insufficient. Washb. Easem. pp.

AGREEMENT DID
NOT ESTABLISH
HIGHWAY OR
EASEMENT.

3, 6, 18, 28. The offer of the appellant company, through its agent McCullough, to allow the defendant a right of way over the premises mentioned in the Clough agreement, was a mere verbal license, revocable at will. Washb. Easem. 5, 19.

It is claimed, however, that had this right of way offered to the defendant by the appellant company been considered by the commissioners in estimating and determining the damages to which the defendant was entitled, that defendant would thereby have acquired a right of way over the premises mentioned in the agreement by estoppel. It is unnecessary to go into the question of estoppel. Upon the part of the appellant company this was substantially a proposition to compensate the defendant, either in whole or in part, his damages for the destruction of his private way, by giving him another way which it claimed would equally serve his purpose. It is sufficient answer to say that the constitution (section 15, art. 2), and the eminent domain act (Code Civil Proc. 74) clearly contemplate compensation in money. It follows that the right of way over other premises offered by the appellant company was not an admissible compensation, either in whole or in part, under the constitution or the statute. In the absence of the assent of the parties, the commissioners had no power to consider the offer, or allow for it in their assessment of damages. As said in the case of *Hill v. Mohawk & H. R. Co.*, 7 N. Y. 157: "Privileges of this kind must depend upon the agreement of the parties. The appraisers had no authority in the premises. They could neither compel the corporation to make the agreement, nor the owner to accept it." *Chicago, M. & St. P. R. Co. v. Melville*, 66 Ill. 329; *Chesapeake & O. R. Co. v. Patton*, 6 W. Va. 147; *Railroad Co. v. Halstead*, 7 W. Va. 301; *In re Morse*, 18 Pick. 443; *Central O. R. Co. v. Holler*, 7 Ohio St. 222.

COMPENSATION
IN MONEY NEC-
CESSARY.

The court did not err in refusing to set aside the report of the commissioners on the ground assigned. The judgment of the court below is affirmed.

Obstruction of Access to Property.—See *Ford v. Metropolitan, etc., R. Co.*, 25 Am. & Eng. R. R. Cas. 182; *Union, etc., R. Co. v. Young*, 5 Ib. 846, and note to 14 Am. & Eng. R. R. Cas. 146.

Damage from the Obstruction of a Private Way.—One cannot have a private right of way across his own land. *Presbrey v. Old Colony & N. R. Co.*, 103 Mass. 1. And where a railroad in the course of its construction was cut through an individual's land, dividing a road which he had made on his own land, for his private use, to pass from one part of his farm to another, and also dividing his pasture, *held*, that these were matters such as must be understood to have been taken into consideration by the commissioners in making their award. *Clark v. Boston, Concord & M. R. Co.*, 24 N. H. 114. But where the only way of access to the plaintiff's land was across a tract called "the Factory Field," which was the property of those under whom

the plaintiff held his land, and which was owned by them when his land was conveyed to him, or over the land of strangers, *held*, that he had a way of necessity over the Factory Field, that his right thereto was independent of the land taken, and that he was entitled to maintain an action for its obstruction. *Kimball v. Cocheco R. Co.*, 27 N. H. 448.

But one who has a right of way across a street, not a public way by grant from the owner of the fee, cannot recover damages of a railroad company duly locating their road over and along said street, and over said right of way. *Boston & W. R. Co. v. Old Colony R. Co.*, 12 Cush. (Mass.) 605. Shaw, C. J., said: "They (the petitioners) had a right of using it (the way) in common with others. Afterwards the owner of the soil granted right of way to the respondents, or, what is equivalent, such a right of using it was taken by law, which is in the nature of a statute purchase. It is very questionable whether the use of one who has a common right can be the ground of claim for damage from another who has only a common right. Each is bound to use his common right as far as practicable, in such manner as not unnecessarily to impede the like use by another. It is only for an abuse of a common right to the injury of another that any legal remedy exists, and then it is to be sought by an action on the case for disturbance. The petitioners were not the owners of the soil over which Lehigh street was laid; they had obtained of the owners certain rights of way, but that did not preclude others from acquiring rights of way under the same soil. The inconvenience occasioned by others thus having a common right is not a distinct cause or source of damage to the petitioners, and is, therefore, distinguishable from the case of *Parker v. Boston & M. R. Co.*, 3 Cush. (Mass.) 113." But where adjoining proprietors by agreement closed a dedicated highway, and in place of it opened a road upon another site, *held*, that whether the road so opened was a public highway or a private right of way, they and those claiming under them had such an interest in it as entitled them to recover damages from a railroad company crossing it in such a manner as to obstruct its free use. *Kansas City, etc., R. Co. v. Farrell*, 76 Mo. 188. Where it appeared on an agreed case that the road of the defendant was constructed and maintained across a private way of the plaintiff in a proper manner, and that a passage was provided for the private way over the track of the railroad, the court could not decide, as a matter of law, whether the safe and convenient use of the private way was obstructed; but this was a question of fact to be settled by the jury. *Greenwood v. Wilton R. Co.*, 8 Post. (N. H.) 261.

SLOUGH v. CHICAGO AND NORTHWESTERN R. CO.

WOODWORTH v. Same.

(*Advance Case, Iowa. June 10, 1887.*)

Sec. 464, Iowa Code, forbids the laying down of any track in a street until after the abutters' damages have been ascertained and paid. *Held*, that this provision does not debar the owners of property abutting on the street who have waited until after the railway has been constructed, from claiming damages.

Under section 1245, Code Iowa, the sheriff's jury can only assess damages for land taken by a railroad, and not damages for injury to property abutting on a street in which the railroad is laid.

Objections to the jurisdiction of such sheriff's jury are not waived by an appeal from their award of damages.

The circuit court, having decided, upon appeal from such sheriff's jury, that it had no jurisdiction of the subject-matter of the proceedings, properly refused to entertain other objections raised, and to determine what the rights of the parties would be if properly presented to the court for determination.

APPEAL from circuit court, Kossuth county.

These causes involve the same questions, and are submitted upon the same abstract and argument. They are special proceedings by which the plaintiffs seek, by a sheriff's jury, to condemn, or rather ascertain the damages to which they claim they are entitled by reason of the construction of a railroad upon certain streets in the city of Algona, upon which streets the plaintiffs own abutting real estate. The damages were assessed by the sheriff's jury, and the railroad company appealed from the assessment to the circuit court. The defendants filed a motion to set aside and cancel the assessment on two grounds, as follows: "(1) The plaintiffs are not entitled to any damages, because defendant's railway merely crosses said streets; (2) plaintiffs had no right to cause their damages to be assessed by a sheriff's jury." The court overruled the motion on the first ground, and sustained it on the second ground, and dismissed the proceedings at the plaintiffs' cost. Plaintiffs appeal.

Geo. E. Clarke for appellants.

Hubbard, Clark & Dawley for appellees.

ROTHROCK, J.—1. It is provided by section 464 of the Code that cities and towns shall have power "to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys, and public places, but no railway track can thus be located and laid down until after the injury to property abutting on the street, alley, or public places upon which such railway track is proposed to be located and laid down has been ascertained and compensated in the manner provided for taking private property for works of internal improvement in chapter 4, tit. 10, Code 1873."

In the case of *Mulholland v. Des Moines, A. & W. R. Co.*, 60 Iowa, 740; s. c., 10 Am. & Eng. R. R. Cas. 99, it was expressly determined that the manner of assessing the damages provided for by section 464 of the Code referred exclusively to the company, and not to the abutting owner. That case was followed in *Wilson v. Des Moines, O. & S. R. Co.*, 67 Iowa, 509. We cannot regard this as an open question, and must adhere to the construction of the statute already adopted.

But it is claimed that the jury selected by the sheriff was the same as had previously been selected at the instance of the railroad company, and that, under section 1245 of the Code, they were the legally constituted tribunal to assess all damages to the owners of real estate in the county, and that the railroad company, or any land-owner, may have the damages assessed by the jury thus selected, upon proper notice. This section has reference to land taken and appropriated for right of way. Under the construction placed upon section 464 of the Code by the cases above cited, the owner of property abutting on a street has no right to pursue this method of maintaining his damages.

It is further claimed that, if the proceeding was irregular and illegal because the owners of the abutting lots had no power to institute the condemnation proceedings, advantage could not be taken thereof by an appeal. It is said the remedy, if any, was by *certiorari*. It is a general rule that objections to the jurisdiction of the court over the subject-matter of the action are never waived. They are not waived by an appearance of the defendant, nor by an appeal from a tribunal having no jurisdiction to hear and determine the question presented. The sheriff's jury in this case had no power to act; it was without jurisdiction; and this question, we think, could properly be raised and determined upon an appeal. See *Spray v. Thompson*, 9 Iowa, 40.

2. The defendant appealed because the court did not sustain the motion to dismiss, upon the ground that the railroad merely crossed the streets, and that plaintiffs were therefore not entitled to damages. It is manifest that the court was correct in refusing to entertain this ground of the motion. Having ascertained and determined that it had no jurisdiction of the subject-matter of the proceedings, it would have been improper to have undertaken to determine what the right of the parties would be if properly presented to the court for its determination. Affirmed.

See *Mulholland v. D., M. A. & W. R. Co.*, 10 Am. & Eng. R. R. Cas. 99, and note to 7 Am. & Eng. R. R. Cas. 623.

PENNSYLVANIA R. Co. v. LIPPINCOTT *et ux.*

Same v. CHURCH OF THE COVENANT OF THE CITY OF PHILADELPHIA.

Same v. STERNER, Admr.

(*Advance Case, Pennsylvania. June 1, 1887.*)

The operation of a railroad on land taken by eminent domain by the railroad and abutting on a public city street, although by reason of smoke and noise an annoyance which diminishes the value of houses on the other side of the street, is nevertheless *damnum absque injuria*, for which the owners of such houses are not entitled to compensation under section 8, art. 16, of the Pennsylvania Constitution.

ERROR to Common Pleas No. 4 of Philadelphia county, to review judgments on verdicts for the plaintiffs in actions of trespass on the case. Reversed.

The facts are stated in the opinion.

The defendant below submitted in each of the three cases the following points:

1. "The defendant, under its charter and supplements in evidence, had full lawful authority to erect and operate the Filbert street extension or branch described in the declaration, without incurring any liability by reason thereof for consequential damages to the property of the plaintiff—the uncontradicted evidence being that none of the said property was taken by the defendant, but that the entire width of Filbert street intervenes between the railroad of the defendant and the nearest point thereto of the property of the plaintiff."

Ans. "Refused." First assignment of error.

2. "The defendant, as purchaser of the main line of the public works of this State under the act of assembly and deed in evidence, had full lawful authority to erect and operate the said Filbert street extension or branch, without incurring any liability to the plaintiff for alleged consequential damages to his property—the uncontradicted evidence being that none of the said property was taken by the defendant, but that the entire width of Filbert Street intervenes between the railroad of the defendant and the nearest point thereto of the property of the plaintiff."

Ans. "Refused." Second assignment of error.

3. "The contracts contained in the charter of the defendant and the supplements thereto in evidence, as well as the contract contained in the acts of assembly and deed for the main line, already

mentioned, authorized the defendant to construct said extension or branch with liability for property taken only; and no subsequent legislation by this State can impair the obligation of those contracts or either of them by increasing the price of the exercise of the franchises granted by imposing an obligation to pay for property alleged to be injured but not alleged to have been taken."

Ans. "Refused." Third assignment of error.

4. "The property of the plaintiff being separated from the railroad of the defendant by the entire width of Filbert street, a public highway of the city of Philadelphia of the width of fifty-one feet, there is no liability on the part of the defendant for alleged consequential damages to the said property."

Ans. "Refused." Fourth assignment of error.

5. "The uncontradicted evidence being that the property of the plaintiff is situated on the north side of Filbert street, a public highway of the city of Philadelphia, on the opposite side from the railroad of the defendant, which does not occupy any part of said street opposite the property of the plaintiff and is erected wholly on its own property, being a distance of fifty-one feet therefrom, and there being no evidence that any of the property of the plaintiff was taken, injured or destroyed by the construction of the said Filbert street extension or branch, the verdict must be for the defendant."

Ans. "Refused." Fifth assignment of error.

6. "The plaintiff's property being situated in a thickly-built portion of the city of Philadelphia and upon the opposite side of a frequented public highway, the defendant is not responsible for the consequences to the plaintiff's property of the proper and careful operation of its road."

Ans. "The sixth point I affirm, with the qualification attached to my answer to the defendant's tenth point." Sixth assignment of error.

7. "Under all the evidence, the verdict should be for the defendant."

Ans. "Refused." Seventh assignment of error.

In the actions by the Church of the Covenant and by Ellen Y. Sterner, Admrx., the defendant submitted also the following points:

8. "The defendant, under the constitution of 1874, is not liable to the plaintiff in damages for injury to his property occasioned by the lawful and careful operation of its railroad. The liability of a corporation for injury to property not actually taken or destroyed by the corporation extends only to the damage directly occasioned by the construction or enlargement of its works, and does not include a liability for the subsequent operation of the road in a careful manner. The jury will therefore not consider

in estimating the damages, if any, any inconvenience to the plaintiff or loss suffered by him in the lower value of his property, in consequence of the dust, smoke, cinders, sparks, noise or other things arising or being caused by the ordinary careful operation of the defendant's railroad."

Ans. "I affirm the eighth point, in so far as it relates to any damage, inconvenience, or loss, if any, which has been caused to the plaintiff by the operation of this railroad after the said road was fully completed. The amount of damages which the plaintiff is entitled to recover, if any, is only the amount of the depreciation in the market value of the property in question by reason of the construction of the defendant's railroad, as such, in view of its future use as a railroad; the amount of such depreciation is to be determined as of the time when the road was completed." Eighth assignment of error.

9. "The defendant, being authorized by law to construct and operate its railroad opposite the property of the plaintiff, is not liable to the plaintiff for damages to his property occasioned by such construction and operation, unless the road was constructed and has been operated in such a negligent way as to be a nuisance. There being no evidence that the road was constructed and is operated in such a manner, there is no liability in damages in the present case, and the verdict must be for the defendant."

Ans. "Refused." Ninth assignment of error.

10. The injury, if any, for which the plaintiff must be compensated must be one which arises from the construction of the defendant's road, as distinguished from its subsequent use or operation."

Ans. "The tenth point I affirm, with the qualification or explanation that the jury is entitled, in any damages they may find from the evidence to have been caused by the construction of the road, to include all such damages as resulted from the construction of the railroad with reference to the uses, concomitants, or incidents of such a railroad in operation. Such damages, however, must be fixed as of the time when the railroad was finished, and must not include as an independent subject of compensation the inconvenience or injury, if any, which has subsequently occurred from the running of the trains and the like operation of the road." Tenth assignment of error.

11. "The proper and reasonable operation of the defendant's road by virtue of its franchise, although it may have occasioned a depreciation in the value of the plaintiff's property, is not an injury for which any damages can be recovered within the meaning of the eighth section of the sixteenth article of the constitution of the State."

Ans. "The eleventh point is affirmed, except in so far as such operation of the railroad would, by way of anticipation, have affected

the market value of the property at the time the railroad was completed." Eleventh assignment of error.

"There is no evidence that the property of the plaintiff was injured by the construction of the defendant's railway within the meaning of the eighth section, article 16, of the constitution of the State, and hence the verdict must be for the defendant."

Ans. "Refused." Twelfth assignment of error.

A. H. Wintersteen, George Tucker Bispham, James A. Logan and Wayne Mac Veagh for plaintiff in error.

G. Heide Norris, Leon Melick, Warren G. Griffith, M. Hampton Todd and E. Greenough Platt for defendants in error.

GORDON, J.—The above-named three several cases involving, as they do, similar facts and principles of law, and having been argued together, we dispose of in one opinion. The actions are case, and the plaintiffs, who own property on the north side of Filbert street in the city of Philadelphia, severally complain that the Pennsylvania R. Co. being a corporation duly chartered under the laws of this State, and invested with the privilege of taking private property for its corporate use, did on the first day of May, 1881, construct, as an extension of its system of tracks and roadbed, a viaduct or elevated roadway, and railroad thereon, along the south side of Filbert street, opposite to their several lots of ground; that since December 1, 1881, the said company defendant has used and operated the said viaduct in connection with its other tracks, as a continuous line of railroad for the transportation of passengers and freight to and from its terminal passenger and freight station, and as a yard for shifting and making up trains; that, in consequence of the noise, disturbance, smoke, sparks, and noisome and unhealthy vapors occasioned and emitted by the defendant's cars and locomotives, great injury has been done to the plaintiffs' property.

It is not alleged that any injury has resulted from the erection of this elevated roadway; nor indeed could it truthfully be so alleged, for the erection is on the defendant's own ground, on the south side of the said street, which street is some fifty-one feet wide, so that no part of the plaintiffs' property or any right of way, or other appurtenance thereunto belonging, has been taken or used in the erection or construction of said viaduct. The damage complained of results wholly from the manner in which the roadway is used; results from the noise, smoke, and dust arising from the use of the engines and cars—the necessary consequence of the use of the property as a steam railway. As the allegations thus made were in whole or in part supported by evidence, the learned judge instructed the jury that the measure of damage would be the difference between the market value of the several properties before

the building of the viaduct, and the same value after the structure was completed; in other words, the same rule was applied to the cases in hand, as that which applies in the case of an appropriation, or taking under the right of eminent domain, excepting, of course, that as no property of any kind was taken, that element of damage was not considered. This instruction, together with the negative answer of the court to the defendant's first point, raises all the questions that require consideration in this case. That there was error in the instruction above stated is, to us, very clear.

This structure having been erected on the defendant's own land, and no property or right of the plaintiff's having been seized, appropriated, or interfered with, we cannot un- THE COMPANY NOT LIABLE. derstand how a rule which applies only to a taking and never did apply to anything else, can be adapted to a case where there has been no such taking. It is not pretended that the erection itself did the plaintiffs any harm, but its use only, that is, the running of locomotives on it.

We agree, indeed, that if the ordinary and proper use of the railway is to be regarded as an element of damage, as to a certain extent it is in the case of a condemnation, the rule stated is the correct one; but as this rule is not one of common but of statute law, it cannot apply to the case now being considered. *Railroad Co. v. Yeiser*, 8 Pa. 366.

Unless, therefore, the case can be brought within some statute, the rule by which damages are measured by advantages and disadvantages ought not to have been adopted, for, as was said in the case cited, per Mr. Justice Rogers: "It is a principle well settled by many adjudicated cases that an action does not lie for a reasonable use of one's right, though it be to the injury of another. For the lawful use of his own property a party is not answerable in damages, unless on proof of negligence."

How then, we ask, can a lawful erection by the Pennsylvania R. Co. on its own ground, be the subject of damage to the adjoining land-owners? And why may it not, as put by the defendant's first point, operate and use in a lawful manner its Filbert street branch without subjecting itself to an action for damage? It seems to be very clear that a private person could do with impunity on his own property just what the railroad company has done. He might build a house and thus shut out his neighbor's view, light and air, he might build an embankment or run a road on or along his own line, and be liable for nothing as long as he used his house, embankment or road in a lawful manner, although in either case an injury may have been done to the adjacent property.

Who does not know that even in the country no householder escapes injury and annoyance from clouds of dust raised in dry

weather by the passage of teams over the common roads? And in the cities this grievance is further aggravated by the intolerable noise occasioned by the use of stone pavements. Nevertheless, we have yet to hear of a case where one lawfully using such road or street was held liable for the injury thus occasioned.

When a company takes, by its right of eminent domain, part of a tract of land, and the damage to the balance is to be measured by the advantage over the disadvantage resulting from the company's works, in such case, as we held in *Searle v. Lackawanna, etc., R. Co.*, 33 Pa. 57, contingent and even imaginary damages may be considered by way of off-set to the alleged advantages. But while this is so, such damages cannot be regarded as a substantive claim.

And we have a reiteration of the same doctrine in the case of *the New Castle & Franklin R. Co. v. McChesney*, 85 Pa. 522, wherein Mr. Justice Woodward remarks, citing the case above named: "It is well settled, even under more comprehensive legislation than this, that contingent damages cannot be taken into account as a substantive claim for damage."

How then can we apply to the case in hand a rule of damages that never was applicable except under special circumstances which do not here exist? It is contended, however, that this case is governed by the constitution of 1874, which provides (art. 16, § 8): "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed in the construction or enlargement of their works, highways or improvements;" and the cases of *Pusey v. Allegheny*, 98 Pa. 522; *Pittsburgh Junction R. Co. v. McCutcheon*, 18 W. N. C. 527; *Pa. R. Co's. App.*, 18 W. N. C. 418, and *Pa. R. Co. v. Duncan*, 111 Pa. St. 352, are cited in support of the rule contended for by the plaintiffs.

But it is a mistake to suppose that these cases are in point. In the first there was not only the construction of a road, but an actual taking; in the *Junction R.* and *Duncan* cases, the injury arose directly from the construction of the works, and the taking and obstruction of the plaintiffs' rights of way; while the *Pennsylvania R. Co's.* appeal covers a case where without warrant of law the company laid its tracks on a public street of the borough of Middletown.

In the case in hand the plaintiffs sustained no injury from the construction of the viaduct; none of their property was taken, neither were any of their rights infringed; so that neither by the constitution nor by the cases quoted is there a warrant for the plaintiffs' contention.

We agree that over and beyond the damages which arise from a taking of property, whether in the shape of land or a right, the

constitution does impose on corporations a direct responsibility for every injury for which a natural person would be liable at common law; so we have held in the case of *Edmundson v. Pittsburgh, etc., R. Co.*, 111 Pa. 316; s. c., 23 Am. & Eng. R. R. Cas. 423; and to this doctrine we adhere, for such we think is the spirit of that instrument, but beyond this we cannot go. Nor is there any reason why we should depart from a rule so reasonable and subject artificial persons to a burden which cannot be imposed upon natural persons.

As was said by Mr. Chief Justice Tilghman in the case of *Shrunk v. Schuylkill Nav. Co.*, 14 Serg. & R. 71, in his comments on the company's charter, which provided that compensation should be made: "If any person or persons shall be injured by means of any dam or dams being erected as hereinafter mentioned, compensation shall be made," says the learned chief justice, "for all damages arising from immediate injury to property, but not for any damage where there is no legal injury, which is called *damnum sine injuria*. And upon reflection we will find that this was a wise restriction. There would be no end to damages for injuries, considered in the most extensive sense of the word, for not only may owners of land contiguous to the river complain of injury by the obstruction to the ascent of fish, but also all other persons living in towns or on lands near the river. . . . There are other kinds of injury, too, sustained, particularly by owners of lands on the river, between the Fairmount dam and the lower falls. All these persons have lost the benefit of navigation free from toll in batteans, flats, etc, which was very useful, as it served for carrying produce to market and bringing up manure for their lands; yet it has not been contended that for such injuries compensation is to be made. Suppose the health of the country to be injured by the evaporation from the dams. Is compensation to be made for this, the greatest of all injuries? I presume not. Where, then, are we to stop, or what is to be the boundary, if we go beyond the line which I have mentioned?"

This is the language of a very learned jurist, and the case is all the more in point in that the wording of the charter of the navigation company and that of the present constitution is very much alike. Nor would the onerous and ruinous consequences be less to the defendant than those which the learned chief justice shows might befall the canal company were the doctrine contended for adopted. Every person who has property in the city or country within hearing of the noise, or in reach of the dust of a railroad, or, for that matter, of a common road, might in the case supposed have damages to be estimated as in the taking of land, or as from a permanent injury arising from the construction of the railroad.

If the Pennsylvania Co. has been guilty of a nuisance; if in the use of its road it makes more smoke or dust than is lawfully allowable in the working of its machinery, and the plaintiffs are thereby injured, they have their remedy, but not for anything short of this. Any other rule would lead to this remarkable result: that the plaintiffs would be entitled to damages without having suffered any injury; that is for anticipated damages, and for which a natural person could not be held liable. Moreover, the corporation would thus be made responsible for the manner in which it proposed to exercise its right, although such manner might not only be lawful, but the best possible, and the least injurious to the property of others.

That the defendant might have hauled its freight and passengers by ordinary carriages drawn by horses, from its West Philadelphia depot, through Filbert street to its station at Broad and Market, without the risk of actionable damage, will, I suppose, not be doubted; yet, certainly, the resulting noise, dust and annoyance to the adjacent property holders would in such case be greater than under the present arrangement. Why, then, for a better method of transportation shall it be held liable? To this question no answer has been given but the dogmatic one already alluded to: "The constitution so provides." But as the constitution does not so provide, and as the plaintiffs' contention has no support, either in statute or common law, we must refuse to entertain it.

The judgments are reversed, and a *venire facias de novo* in each case is awarded.

Mr. Justice TRUNKEY and Mr. Justice STERRETT dissent.

Smoke, Noise, etc., as an Element of Damage.—See *Cogswell v. New York, N. H. & H. R. Co.*, 27 Am. & Eng. R. R. Cas. 376; note, 24 Ib. 293; *Republican Valley R. Co. v. Linn* 14 Ib. 198; *Bowen v. Atlantic, etc., R. Co.*, 14 Ib. 332.

Consequential Damages to Land Not Actually Taken for Public Use.—See *Rochette v. Chicago, etc., R. Co.*, 17 Am. & Eng. R. R. Cas. 192, and note.

Definition.—By the term consequential damages are to be understood those damages which arise, not from the immediate act of the party, but in consequence of such act. Bouv. Dict. The term consequential damage means sometimes damage which is so remote as not to be actionable; sometimes damage which, though somewhat remote, is actionable; or damage which, though actionable, does not follow immediately, in point of time, upon the doing of the act complained of. *Eaton v. B. C. & M. R. Co.*, 51 N. H. 504.

The Pennsylvania Doctrine.—Before the Pennsylvania constitution of 1874 went into effect the law of that State gave to property owners an action for damages against municipal and other corporations and individuals invested with the privilege of taking private property for public use, when their property had been taken for a public improvement. The mischief was that there was no law which gave redress against such corporations and individu-

als for injuries to property not actually taken. It was the common law that all legal injuries to property caused by corporations or individuals not invested with the privilege of taking private property for public use were the subject of redress. The possession of the privilege of eminent domain, therefore, gave to individuals and corporations an unfair immunity from liability for injury to property not taken. The remedy given by the constitution of 1874 was that it took away from such corporations and individuals their immunity, and put them in the same category as to liability as other corporations and individuals. Since then, for whatever injuries individuals or corporations not invested with the sovereign right of eminent domain are liable, corporations and individuals having this right are also liable. The constitutional provision did not create or confer a new right. There was no especial burden imposed by it or intended to be imposed by it upon one class of persons, which had not previously been known and recognized in the law as imposed upon all classes of persons, except those having the sovereign right of eminent domain. Its purpose was to limit or restrain a privilege or immunity, and to do that only. See *Edmundson v. Pittsburgh, etc., R. Co.*, 111 Pa. St. 820. Thus in *O'Connor v. Pittsburgh*, 18 Pa. St. 187, the court say: "But to attain complete justice every damage to private property ought to be compensated by the State or corporation that occasioned it; and a general statutory remedy ought to be provided to assess the value. The constitutional provision for the case of private property taken for public use extends not to the case of property injured or destroyed; but it follows not that the omission may not be supplied by ordinary legislation."

The words of the 8th section of article 16 of the constitution, providing for consequential damage, are as follows: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements." The extent of compensation for injuries depends upon the word "injured" as used in the instrument. In *Shrunk v. Schuylkill Nav. Co.*, 14 Serg. & R. (Pa.) 71, the charter of the Schuylkill Navigation Co. provided that "if any person or persons shall be injured by means of any dam or dams being erected, as hereinafter mentioned," compensation should be made. The court held that, under these words, "compensation shall be made for all damage arising from immediate injury to property, but not for any damage where there is no legal injury, which is called *damnum sine injuria*. . . . There would be no end to damage for injuries, considered in the most extensive sense of the word." In *Lehigh Bridge Co. v. Lehigh Coal, etc., Co.*, 4 Rawle (Pa.), 23, the charter of the navigation company provided that "if any person or persons shall be injured by means of any dam or dams being erected," etc. The court held that "the legislature evidently meant to provide for nothing that was not remediable at the common law; and, on the other hand, it was intended that every common-law injury should be redressed by the statutory remedy."

In *Watson v. Pittsburgh, etc., R. Co.*, 47 Pa. St. 469, the act of incorporation provided that if the owner or owners of land should refuse to permit the entry or occupation by the railroad company upon it, and the parties could not agree upon the "compensation to be made for any injury or supposed injury that might be done to said land by such entry and occupation," they might appoint appraisers to estimate the damages. The court in passing upon the provisions said, "Nothing can be recovered for anything which is not groundwork for damages at common law; but the construction which has been given to the legislative charters for improvement companies generally, has been that they are intended to secure compensation for all such injuries as the common law recognizes as fit subjects for compensation. And

this has been held notwithstanding considerable difference in the language employed by the legislature."

The definite meaning attached to the word "injury" as used in statutes and in the constitution is well shown in the case of Pittsburgh, etc., R. Co. v. Jones, 111 Pa. St. 104, which decided that the owner of the franchise of a public ferry did not sustain a legal injury, and could not recover damages for diversion of business from the ferry by reason of the building of a railroad near it.

Connecticut.—The question first came before the Connecticut court in *Hollister v. The Union Co.*, 9 Conn. 436. There a company was authorized to remove obstructions in the Connecticut river. In doing this the current was somewhat straightened and made more rapid; and the plaintiff claimed that his land was in consequence worn away. And the court held that, this being a public navigable stream belonging to the sovereign power, that power had a good right improve its navigation, in the manner done by the defendants, and that when the lands on the banks were granted, they were subject to that condition; and so the owners of these banks and not the public were bound to protect them against the damage which might arise from such improvements. But in *Hooker v. New Haven & N. Co.*, 14 Conn. 146, it was held that the legislature cannot authorize a canal whose existence will cause the flooding of adjoining land, without allowing compensation. This case again came before the court in *Hooker v. New Haven & N. Co.*, 15 Conn. 328, where the circumstances must have been different, as the opposite conclusion was reached. There it appeared that the charter of a canal company directed the appointment of commissioners to lay out the canal and the works appurtenant to it, to notify the persons whose land was taken, and to appraise and assess land damages in all such cases; and authorized the company, with the consent of the commissioners, to take all lands and water necessary for their purposes. The plaintiff's lands never having been included in the commissioners' survey or taken by the company, and being only remotely affected by the action of the company complained of, it was held that the commissioners had no authority to assess his damage.

In *Dinslow v. New Haven & N. Co.*, 16 Conn. 103, the question was whether the defendant corporation was responsible for the diversion of the waters of a stream, upon which was plaintiff's factory. The defence was that nothing had been done which was not authorized by the defendant's charter, and by the sanction of the commissioners under whose approval they acted. The court held the case not distinguishable from the case of *Hooker v. N. H. & N. Co.*, 14 Conn. 146, inasmuch as in each the injury complained of was the direct result of the work of defendants; the diversion being occasioned by a dam erected by defendant. The court therefore allowed a recovery in an action on the case. See also *Elliott v. Fair Haven & W. R. Co.*, and *Burroughs v. Housatonic R. Co.*, 15 Conn. 181, the latter case holding that there can be no recovery for a loss by a fire originated by a spark from the smoke-stack of defendants' locomotive, there being no pretence of negligence.

In *Skinner v. Hartford Bridge Co.*, 29 Conn. 536, the defendants were authorized to construct a causeway leading to their bridge, at least twenty feet, paying damages for lands taken therefor. *Held*, that the assessments of damages must be presumed to have been for a causeway of any height that might be necessary, and that the company might raise the causeway from time to time, if necessary for public convenience, without any further liability to the adjoining proprietors, however much a change of grade might incommode them.

Bradley v. N. Y. & N. H. R. Co., 21 Conn. 308, was a clear case of consequential injury, and damages were allowed. There the defendants excavated the bed of their road so near a blacksmith shop, owned by the plaintiff, as to

render its foundations insecure; and having occasion to build a bridge over the road in the street on which the shop was situated, and to raise the grade of the street, made, in so doing, an embankment in front of the shop, so high that it shut off all access to it and made it untenable. *Held*, that while the plaintiff's land was not *taken*, it was undoubtedly *injured*, and that the defendants' charter covered the case, and entitled him to damages; the right of the public to regrade the highway without paying any new damages not attaching to the defendants when acting for their private benefit. *Quare*, whether it would not be within the powers of the legislature to construct railroads by its own agents for the use of the public, or to empower subordinate bodies to construct them wherever public necessity might require, without providing or making compensation to any persons injured thereby, except those whose lands were directly taken.

The location of a railroad upon a public highway is the imposition of a new servitude upon the land, in addition to and distinct from that to which it was originally subjected when taken for a highway, and the owner of the fee is entitled to compensation for damages caused thereby. *Impley v. Union Branch R. Co.*, 26 Conn. 259. But otherwise with reference to a horse railroad. *Elliott v. F. H. & W. R. Co.*, 32 Conn. 580.

COLUMBUS, HOCKING VALLEY AND TOLEDO R. Co.

v.

GARDNER.

(*Advance Case, Ohio. October 4, 1887.*)

In an action by the owner of property abutting on a public street of a municipal corporation, which is occupied by a railroad track, under an agreement with the municipal authorities, by virtue of section 3283, Rev. St., to recover against the railroad company for injury to such property by the laying of the track, it is competent to take into consideration evidence of substantial injury and loss to the property (not common to the community at large) caused by smoke, noises, and sparks of fire occasioned by running of locomotives and cars along the track in front of the property.

On the trial of such action, witnesses were permitted, against objection, to testify how much less per year was received as rent for the property affected, since than before the track was laid in front of it; to give their opinions concerning the amount of damages sustained; and also their opinion as to "the difference in value of the property with the track in the street and if it was some other place." *Held*, this was error.

ERROR to circuit court, Gallia county.

The Ohio & West Virginia R. Co., afterwards merged into the Columbus, Hocking Valley & Toledo R. Co., plaintiff in error, by agreement with the city council of the city of Gallipolis, laid its railroad track in and along the centre of Spruce street, near to and in front of the property of defendants in error, operating its loco-

motives and cars thereon. The railway company does not claim to have acquired any right of way from the defendants in error. This is a suit to recover damages to the abutting lot of defendants in error by reason of the occupation and use of such street by the railway company. The defence interposed was that the railroad was duly constructed according to law and the ordinance of the city, and was properly and lawfully operated; and also a denial that defendants in error had suffered the damage alleged in the petition. The issues were tried by a jury, which returned a verdict for plaintiffs, assessing their damages at \$1000. Defendant below, now plaintiff in error, filed its motion for a new trial, which was overruled. The circuit court affirmed the decision of the common pleas. This suit is brought to reverse the decision of the circuit and common pleas courts.

Upon the trial of the cause, Morgan Mollohan, one of the plaintiffs, offered himself as a witness, and testified as follows: Plaintiff's counsel asked him the following question: "You may state your damage by reason of the railroad being in Spruce street." To which question the defendant objected, and the court overruled the objection; to which ruling the defendant, by its counsel, excepted. And the witness, in answer to the question, testified as follows: "Two thousand dollars."

Gardner, the other plaintiff, was asked the following question upon the trial: "How much less per year do you receive as rent for the store-room on these premises, described in your petition, than before the railroad was built along Spruce street?" Which question was objected to by defendant's counsel; whereupon the court overruled defendant's objection thereto; to which ruling defendant, by its counsel, objected. And thereupon the witness, in answer to the question, testified: "We made a difference of \$50 a year in the rent. I got \$50 less for my half than I did before the railroad was built on Spruce street." Against the objection of the company, the following question was permitted by the court to be asked and answered, concerning the extent of the plaintiff's injury: "What difference is there in the value of this property with the track there and with it somewhere else?" The same interrogatory, in the same form, was allowed to be propounded to and answered by several witnesses, over the objection and exception of the company.

After the argument of counsel, the court charged the jury, among other instructions, as follows: "The measure of damages is the difference between what the property is now fairly worth in money, and what its money value would be if the track complained of had not been built along the street in front of it; and, in determining that difference, you may take into consideration, among other circumstances, the evidence relating to the annoyances occa-

sioned to the occupant of the property by smoke, noises, and sparks of fire occasioned by running of locomotives and cars along the track in front of the same." To which charge the defendant excepted. There was evidence submitted to the jury upon the trial which rendered this charge pertinent, and tended to show injury and depreciation to the plaintiff's property beyond what would result from such annoyances as were common to the community at large.

The action of the court, as shown in the foregoing statement, is assigned for error in this court as a ground of reversal of the judgments below. Other questions are presented by the record, but, as the foregoing comprehend the questions which engage the consideration of the court, they are omitted from this statement.

J. A. Wilcox and *S. A. Nash* for plaintiff in error.

A. L. Roadamour and *D. B. Hebar* for defendants in error.

OWEN, C. J.—The agreement between the railway company and the city of Gallipolis, in pursuance of which the former laid its track along the street of the city, was made under the authority of section 3283 Rev. St., which provides that "if it be necessary, in the location of any part of a railroad, to occupy any FACTS. public road, street, alley, way, or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company, may agree upon the manner, terms, and conditions upon which the same may be used and occupied; and if the parties be unable to agree thereon, and it be necessary, in the judgment of the directors of such company to use or occupy such road, street, alley, way, or ground, such company, may appropriate so much of the same as may be necessary for the purposes of its road, in the manner and upon the same terms as is provided for the appropriation of the property of individuals. But every company which lays a track upon any such street, alley, road, or ground shall be responsible for injuries done thereby to private or public property lying upon or near to such ground; which may be recovered by civil action brought by the owner before the proper court, at any time within two years from the completion of such track.

One of the important questions in the case is: Did the trial court err in charging the jury that it could take into account, in estimating the damages of the lot-owners, the evidence relating to the annoyances occasioned to the occupant of the property by smoke, noises, and sparks of fire occasioned by running of locomotives and cars along the track in front of the same.

This the evidence tended to prove, as shown by the testimony of one of the witnesses, on cross-examination by the company: "Tell me what enter into your ideas of damage to this property. Answer: Well, this building there was for the purpose of a store.

They were doing business in it, and it used to be a valuable stand, but it is not a desirable place now, because he keeps a general store, and did a country business, but the road has run the customers off. I stayed there seven years; quit in 1879. As elements of damage, I consider the shaking or jarring, smoke; for we had to close all the doors whenever there was a train, as the smoke made everything so dirty. He used to keep some white goods, and it would ruin them; kept prints, more or less, and it damaged everything of that kind."

The plaintiff in error relies upon the authority of *Parrot v. Railroad Co.*, 10 Ohio St. 624, as conclusive upon this question. Two propositions of the syllabus in that case are: "(1) That such

RIGHT OF ADJUT-
TING OWNER TO
DAMAGES.

owner and occupant is entitled to damages for any obstruction to the street by earth, gravel, timber, or rail, substantially affecting his use of such street as an appurtenance to his premises. (2) That, in respect to noises, smoke, vapor, or other discomforts arising from the ordinary use of the railroad by the company, the occupant and owner of such lot and dwelling-house has no more right to recover damages of the company than any citizen who resides, or may have occasion to pass, so near the street and railroad as to be subjected to like discomforts. A railroad authorized by law, and lawfully operated, cannot be deemed a private nuisance." This was an action of trespass on the case, brought anterior to the Code, and seems to have been considered by the court without reference to the remedy which is contemplated, and, indeed, provided for, by the act in question. For, whereas the court declares in that case that the owner of such lot has no more right to recover damages of the company than any citizen who resides, or may have occasion to pass, so near the street and railroad as to be subjected to like discomforts, the act in question expressly authorizes an action and recovery for injuries done by laying a track upon any such street or ground to private or public property "lying upon or near to the street or ground upon which the track is laid." It seems that, to entitle a property owner to recover for injury to his property, it need not necessarily be situated upon the street occupied by the track. The statute reaches beyond the decision in prescribing a remedy for a party whose property is injured by the location and operation of a railroad track through the street of a municipal corporation.

It is quite clearly apparent that the court, in the case last cited, was dealing with the subject of "noises, smoke, vapor, or other discomforts" upon the assumption that they were such inconveniences as the public at large must bear, in return for the public good to be acquired, and not as special and peculiar causes of injury and depreciation to the property affected, as contemplated by the statute before us, in its application to a case like the one at

bar. The provision in force at the time of the injury complained of in that case, of which section 3283 is an amendment, created no such remedy for land-owners as we are considering. 46 Ohio L. 45. True, in the case at bar, the property involved was situated upon the street occupied by the track. It cannot be claimed, however, that the remedy of the owners is restricted by that fact. The plaintiffs below owned a valuable interest in the street taken by the railroad company for the use of its track. This is too well settled by the adjudications of this court to justify the citation of authorities to sustain the proposition. This interest was a proper subject for appropriation and compensation by the company. It was taken without either. It was not within the power either of the city of Gallipolis, or of the general assembly, to authorize the company to take this property of the plaintiffs below without compensation. While, as between the city and the company, the taking of the street was rightful, between the company and the plaintiffs it was wrongful. Whether the action below was one in the nature of an appropriation we need not inquire. The question involved was whether, in the sense contemplated by the act in question, the property of the plaintiffs was materially and substantially injured by the location and operation of the railroad track upon the street upon which such property abutted. Having invoked the provisions of this statute, it is not unreasonable that the company should be held to the remedies which it prescribes to parties injured.

The company further cites and relies upon *Hatch v. Railroad Co.*, 18 Ohio St. 92, where it was held: "Nor is such owner entitled in such action to recover on account of increased danger from fire to his buildings or other structures, . . . unless the proximity of his buildings, etc., to the railroad be such as to render the danger imminent and appreciable." The evidence below tended to show such a condition of things as, upon the proposition of this case, entitled the plaintiffs to damages.

While it may be conceded that, in estimating the plaintiffs' damages, the jury would not be permitted to take into account the consequences of the operation of the railroad which were common to the community at large, no sound reason exists for excluding from consideration such elements of inconvenience, annoyance, danger, and loss as result to the property, its use and enjoyment, from the "smoke, noises, and sparks of fire occasioned by running of locomotives and cars along the track in front of the same," if it be shown that these caused special injury and depreciation to the property. The right to the use of this street by the public as an ordinary highway was all that had been surrendered by the owners of these abutting lots prior to the location of the railroad track. In that use there were none of the elements of injury of

which they now complain. Without their consent, and against their right, these new and injurious burdens have been imposed; and that in perpetuity, and to their substantial loss. What better rule of redress can be adopted than one which requires that this loss should be fully repaired; that the injured party should be made whole by having restored to him, as far as this may be done in money, what he has lost in the depreciation of his property by reason of the new burdens to which it has thus been subjected?

It seems clear to us that this rule of recovery was within the legislative intent when it was provided that "every company which lays a track upon any such street, alley, road, or ground, shall be responsible for injuries done thereby to private or public property lying upon or near to such ground," etc. This view is supported by *Railroad Co. v. Ball*, 5 Ohio St. 568; *Hatch v. Railroad Co.*, 18 Ohio St. 92; *Dodson v. Cincinnati*, 34 Ohio St. 276; *Powers v. Railway Co.*, 33 Ohio St. 429; *Railroad Co. v. Cobb*, 35 Ohio St. 94; *Railroad Co. v. Williams*, Id. 168; *Railroad Co. v. Mowatt*, Id. 284; *Railway Co. v. Lawrence*, 38 Ohio St. 41; s. c., 7 Am. & Eng. R. R. Cas. 93; *Railroad Co. v. Hambleton*, 40 Ohio St. 496; s. c., 14 Am. & Eng. R. R. Cas. 126; *Cohen v. Cleveland*, 43 Ohio St. 190; *Grafton v. Railway Co.*, 21 Fed. Rep. 309; s. c., 17 Am. & Eng. R. R. Cas. 200. The latter case is important from the fact that it is reported by an eminent jurist, Mr. Justice Matthews, who was construing the statute now before us. He says: "In an action by the owners of such abutting lots against the railroad company for damages, they are entitled to recover full compensation for the depreciation in value of their property caused thereby. . . . The statute must be taken to mean what it plainly says; and, there being no sufficient reason to the contrary, must be so construed that the railroad company, in the case contemplated, shall be held responsible for all injuries of every description done by its work to the plaintiff." This construction of the statute also finds support in *Adden v. Railroad*, 55 N. H. 413, where it is said: "Whatever tends directly and substantially to diminish the value of the tract of land left to the owner should be weighed and considered in determining his damages. That imminent and appreciable danger from fire does so diminish the value of his property there can be no question. The location of the track, and all such matters as grow out of and are caused by the location, are proper matters for the jury to consider."

In *Railroad Co. v. Combs*, 10 Bush, 382, 19 Am. Rep. 73, the court say: "If his houses are damaged by having soot, smoke, or fire from passing engines thrown or blown into or against them, he is entitled to recover for this also. The diminution of the value of the adjacent property occasioned by these circumstances will be the measure of his right of recovery." In *Railway Co. v.*

Heisel, 38 Mich. 62 the court say (Cooley, J.): "In such a case, his injury is not confined to making use of the public easement, but he may recover for any injury the incumbrance causes;" and continues: "He may recover for annoyances to business or to family occupation which the operations of the railroad company may cause." In *Ham v. Railway*, 61 Iowa, 716; s. c., 14 Am. & Eng. R. R. Cas. 204, it was held, after giving the rule to be the difference in value, that, "in estimating such damages, the obstruction of the owner's view, interfering with his privacy, and the noises of operating trains, were proper to be considered." In *Railway Co. v. Eddins*, 60 Tex. 656, the court say: "Injuries resulting from sparks of fire from engines, smoke, cinders, unusual noises from bells and steam-whistles, and other annoyances of like character, are proper elements of damage." These cases are in line with the manifest tendency of modern adjudications.

In *Lahr v. Railway Co.*, 104 N. Y. 268, the court of appeals of New York was recently called upon to consider some of the questions involved in the case at bar, and unanimously declared the following to be the law of the case: "(1) Abutters upon public streets in cities are entitled to damages sustained by them by reason of a diversion of the street from the use for which it was originally taken, and its appropriation to other and inconsistent uses; following *Story v. Railroad Co.*, 90 N. Y. 122; s. c., 7 Am. & Eng. R. R. Cas. 596. (2) An elevated steam railroad in the streets of a city, as usually constructed, is a perversion of the use of the street from the purpose originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction without providing for compensation for the injury inflicted upon the property of abutting owners; following same case. . . . (5) In an action by an abutter to recover for the injury to his premises caused by an elevated railroad built in front of them, damages can be recovered on account of the gas, smoke, steam, dust, cinders, ashes, and other unwholesome substances emitted from the locomotives."

The exceptions to the instructions given to the jury upon this subject were not well taken, and the assignment of error thereon is disallowed.

2. Did the trial court err in the admission of evidence upon the subject of the damages sustained? The following questions were permitted to be asked and answered: "State your damage by reason of the railroad being in Spruce street?" "How much less per year do you receive as rent for the store-room on these premises, described in your petition, than before the railroad was built along Spruce street?" "What difference is there in the value of this property with the track there and with it somewhere else?"

ADMISSION OF
OPINION EVIDENCE
HELD ERRONEOUS.

It is too well settled in this state to admit of controversy that the rule of damages in such cases is the difference in the value of the property affected before, and the value after the location of the railroad, and that this is to be determined by the jury in the light of the facts established by the evidence, and not upon the mere opinions of witnesses, except so far as opinions may be received upon questions of value. *Railroad Co. v. Campbell*, 4 Ohio St. 595; followed and approved in *Railroad Co. v. Ball*, 5 Ohio St. 573. In each of these cases witnesses were allowed to testify to their opinions concerning the amount of damages sustained, and in each case this was held to be error, and the judgment reversed. The jury is entitled to be informed by witnesses concerning the value of the land before, and the value of it after, the location of the road. These are the primary facts which enable the jury to determine the extent of the injury. If it be contended that when a witness has stated what, in his opinion, is the difference in the value of the land before and after the location of the road, or how much less it is worth after than before, he has substantially stated the substantive fact to be ascertained, the obvious answer is that he is, by this form of inquiry, left to estimate in his own mind the amount of damages sustained, and give this to the jury as the difference in value. There is no assurance that he will, in making his estimate, take into account the actual value before and after the location of the road; indeed, there is no assurance that he may have an intelligent opinion of the value of the land affected, either before or after such location.

In *Powers v. Railway Co.*, 33 Ohio St. 437, it is said by Day, J., in speaking for the court: "On the trial, one of the land-owners was permitted to answer, against the objection of the company, the following questions, viz.: 'How much less value will your land be in consequence of this appropriation?' Afterwards substantially the same question was asked of another witness on the part of the company, to which the land-owners objected, and the court sustained the objection, but, in so doing, at the same time ruled out the answer already given by the land-owner, to which he excepted. The ultimate ruling of the court in regard to the propriety of the question as asked on both sides would seem to be sustained by the holding in *Railroad Co. v. Campbell*, 4 Ohio St. 583, and *Railroad Co. v. Ball*, 5 Ohio St. 568." Here is more than an intimation that these two forms of question—one relating to amount of damage, and the other to difference in value—are substantially equivalent. But the form of question we are considering related to the difference in the value of the property "with the track there and with it somewhere else." What other location of the track with reference to the property, and how such different location may have affected its value, was concealed in the mind of the witness, so that

his answer may have been a mere opinion upon facts of which the jury was not permitted to have the benefit. It was permitting the witness to usurp the province of the jurors, and settle for them the ultimate fact which they were called upon to determine.

Concerning the question which involved the rents received, it is not easy to see how the jury could be aided in determining the value of this property by being informed how much less per year the plaintiff received as rent after the location than before. The actual value of the rent was not necessarily involved in this question. If this inquiry was permissible, it would place it in the power of the plaintiffs, by private compact with the lessees, to fix their own basis of damages. Special reasons may have existed for letting the property at an extremely low rate of rent, and other reasons may have induced an extremely high rate; and all this without necessary reference either to the actual value of the property, or over the actual rental value. The question did not call for an estimate of the actual rental value of the property, but simply called for a disclosure of the terms of a particular letting, which may and may not have been made with reference to the fact which the jury was to determine. But, even if the inquiry had covered the past and prospective rental value of the property, we are met by the declaration of this court in *Railway v. Railway*, 30 Ohio St. 624, that "it is the difference in the value of the land, and not the diminished annual rental, that is to determine the damage;" citing *Amsden v. Railroad Co.*, 28 Iowa, 542. This case is cited and approved in *Powers v. Railway*, 33 Ohio St. 435, where it is said: "The difference in the value of the owner's property with the appropriation and that without it is the rule of compensation. This difference must be ascertained with reference to the value of the property in view of its present character, situation, and surroundings. It cannot be enhanced by proving facts of a contingent and prospective character, such as the probable rents that may be derived from the property," etc.

In permitting the foregoing questions to be asked and answered, there was error which calls upon us to reverse the judgments below.

3. The error assigned for the following charge of the court is not well taken: "And I say to you that the track was completed whenever the defendant, or its predecessors, put it in condition fit for permanent use in running trains of railroad cars over it, and with a view to permanently using and occupying the track for that purpose in connection with the main line; and the two years within which the action must be commenced, begins to run from that time." "If, after the defendant, or its predecessors, had put the track in condition for permanent use, it deemed it necessary or convenient to change, and did change, the track, by moving and placing it on a part of the street less injurious to the plaintiff's

property, the jury would not be justified in saying, from the fact of the change alone, that it was not completed until after the change was made; but the fact of the change is a circumstance to be considered by the jury in determining whether the track was completed before the change or not.

Judgment reversed, and cause remanded.

Consequential Damages.—See preceding case and note.

Witness held Entitled to give General Estimate of Damages.—*Sherman v. St. Paul, M. & M. R. Co.*, 10 Am. & Eng. R. R. Cas. 193; *Bowen v. Atlantic, etc., R. Co.*, 14 Ib. 882.

DRUCKER

v.

MANHATTAN R. CO. and METROPOLITAN ELEVATED R. CO.

(*Advance Case, New York. June 7, 1887.*)

Where an action to recover for the alleged impairment of an easement of light, air and access appurtenant to plaintiff's land from the construction and operation of an elevated railway was tried upon the assumption that plaintiff had either a fee or an easement in the street, and the litigation was confined to the question of damages, and the point that plaintiff did not own the fee or an easement was not taken on the trial, it is too late to raise the point on appeal.

An elevated railroad and its operation impose upon a street an unauthorized use and are illegal and wholly a trespass as against abutting owners not duly compensated, and the damages recoverable include whatever of injury or inconvenience results from the structure itself or are incidental to its use.

In an action of trespass to recover damages for injury to plaintiff's property abutting on a street whereon an elevated railway had been constructed, evidence that since the building of the road the trade and business of the street had fallen off, and the current of custom had largely lessened in volume and changed in character, and which tended to show that, by reason of the falling off of business, rental values on the street had seriously diminished, was admitted. *Held*, that such evidence was admissible on the question of damages, although such evidence also established that such result was due in part to a tendency of business to move uptown, with which the elevated road had nothing to do, and it is no objection to such evidence that under it the decision of the jury involves more or less of estimate or opinion, when all reasonable data have been furnished for their information.

Smoke, gases, ashes and cinders, which affect and impair the easement of air; the structure itself and the passage of cars which lessen the easement of light; the drippings of oil and water, and the frequent columns, which interfere with convenience of access, are elements of damage, although they are the necessary concomitants of the construction and operation of the road, and are not the product of negligence; they abridge the land-owner's easement.

APPEAL from a judgment of the general term of the superior court of the city of New York, affirming a judgment of the trial term in favor of plaintiff in an action to recover for the alleged impairment of an easement of light, air and access appurtenant to plaintiff's land from the construction and operation of defendants' elevated railways. Affirmed.

The facts appear from the opinion.

Julien T. Davies, Edward S. Rapallo and Charles A. Gardiner for appellants.

Roger Foster for respondent.

FINCH, J.—This case was tried upon the assumption that plaintiff owned the fee to the centre of Division street; or if not, that he had in it, as abutting owner, an easement of light, air and convenience of access. The point now made, that plaintiff did not own the fee because Division street was not shown to be identical with that laid out by Rutgers and Delancey; and was not the owner of an easement because the title to the street presumptively from its age came to the city from a Dutch ground brief or an English grant, and was an absolute fee unclouded by any trust,—was not taken upon the trial either by objection to evidence or a motion for a nonsuit or by requests to charge, or exceptions to the charge as made.

WHETHER PLAINTIFF HAD FEE OR EASEMENT IN THE STREET—TOO LATE TO DISCUSS.

It seems to have been conceded all through the trial that plaintiff had either a fee or an easement in the street, and that for the purposes of the action it was immaterial which; and so the litigation was confined to the question of damages and its true measure. It is too late now to raise or discuss in the case the point suggested. If it had been raised on the trial, the identity of the street with that of Rutgers and Delancey might have been clearly shown, or the facts of its origin accurately developed.

The further questions raised respected the proof of damages. The action shaped itself into one of trespass for the occupation and impairment of plaintiff's easement for the period beginning with the construction of the road and ending with the commencement of the suit.

THE RULE OF DAMAGES.

In the case of *Lahr v. Met. Elevated R. Co.*, 104 N. Y. 268, three out of five members of the court voting in the case put the rule of damages upon the proposition that the road and its operation imposed upon the street an unauthorized use, and were illegal and wholly a trespass as against abutting owners not duly compensated. As a logical consequence the majority held that the damages recoverable included whatever of injury or inconvenience resulted from the structure itself or were incidental to its use.

This rule opened the door to proof of every injury traceable to the road or its operation; and was said to be that "however the

damage may be inflicted, provided it be effected by an unlawful use of the street, it constitutes a trespass, rendering the wrongdoer liable for the consequences of his acts." Under that rule none of the evidence offered was inadmissible, for it all tended to show how far and in what manner the plaintiff had been injured by the trespass. But the then minority of the court favored a narrower rule of damages. Yielding, as in duty bound, to the authority of the Story case, they admitted that so far as the road by its construction or use took or destroyed or impaired the abutter's easement of light, air and access it was a trespasser, but maintained that beyond that and for consequential damages, which did not touch the easement or invade its enjoyment, it was not a trespasser but stood under the protection of the general rule freeing it from liability for any incidental injury or annoyance resulting from its careful and lawful operation.

But even that restricted rule, which has not as yet received the sanction of the court, appears not to have been violated upon the trial of this action. The judge charged "that nothing is recoverable, except for interference with and occupation of plaintiff's light, air and access;" that no damages could be recovered for negligence in the construction or operation of the road since no such cause of action was pleaded; and that it made no difference in the measure of damages that the defendants had not acquired title by condemnation proceedings. The appellants do not complain of this charge or the measure of damages applied, but do complain that evidence was admitted going quite beyond its boundaries. We are of a different opinion.

Objection was made to the proof that since the building of the Elevated Road the trade and business of Division street had fallen off, and the current of custom had largely lessened in volume and changed in character; and upon the ground that injury to the plaintiff and not to his neighbors was alone material. But to measure and appreciate that individual loss the nature and extent of the general injury was necessarily to be considered.

To ascertain how much the plaintiff was harmed by the impairment of his easement required a survey of the general facts and a deduction from them of the particular and special damage to be estimated. The evidence tended to show that, by reason of the falling off of business, rental values on the street had seriously diminished; but also established that this result was due in part to a tendency of business to move "uptown" with which the Elevated Roads had nothing to do. How much of the diminution of rental values was due to the construction and operation of the Elevated Roads, and what part of that portion was caused by the impairment of plaintiff's easement, was the problem of damages and could only be solved by taking into view the general loss and its nature

and extent, and then estimating out of it the part or share suffered by the plaintiff from the taking or impairment of his easement.

But that, it is said, could not be done with any certainty or precision, and left the jury to guess and speculate in reaching a result. It is often the case that damages cannot be estimated with precision, and the basis of accurate calculation is wanting and inadequate. That is notably true in many cases of personal injuries.

Such evidence as can be given should be given, and the facts naturally tending to elucidate the extent of loss should not be withheld. But when all the proof which in the nature of the case is fairly possible has been given, the good sense of a jury must provide the answer; and it is no defence that such judgment involves more or less of estimate and opinion, having very little to guide it. That criticism has no force in the mouth of the wrongdoer, when all reasonable data have been furnished for consideration.

If we inquire further into the details of the injury suffered, we shall find that no proof was objected to which should have been rejected, even under the narrower and more restricted rule above suggested. Smoke and gases, ashes and cinders affect and impair the easement of air. The structure itself and the passage of cars lessen the easement of light. The drippings of oil and water, and possibly the frequent columns, interfere with convenience of access. These are elements of damage, even though the necessary concomitants of the construction and operation of the road, and not the product of negligence, for they abridge the land-owner's easement, and to that extent at least are subjects for redress in an action for damages. There remains but the annoyance of noise and vibration of the buildings, among the specific injuries mentioned on the trial. But no objection or exception selected these out as improper elements in the proof of damage, and the question which might involve the difference of opinion among us is not here presented.

The judgment should be affirmed, with costs.

All concur, except RAPALLO and PECKHAM, JJ., not voting.

Elevated Railroads—Damages to Abutting Land-owners.—See, generally, *Story v. N. Y. E. R. Co.*, 7 Am. & Eng. R. Cas. 596; *Fifth Nat. Bank v. N. Y. E. R. Co.*, 22 Ib. 146.

Smoke, Noise, etc., as an Element of Damages.—See *Pennsylvania R. Co. v. Lippincott*, and note, *ante*, p. 399.

CATHEDRAL OF THE HOLY TRINITY

v.

WEST ONTARIO PACIFIC R. CO.

(*Ontario Reports*, 14 *Ch. D.* 246.)

The plaintiffs were incorporated under 37 Vic. ch. 91 (O.) for the purpose of building a cathedral, and were the owners of a block of land enclosed within one fence, and bounded on three sides by streets, known as the Cathedral or Chapter House Block, upon which they had erected a Chapter House as part of the Cathedral, and had leased other portions, but for want of funds the other part of the Cathedral was not proceeded with for some years.

The defendants, in constructing their railway, required part of the block, which would cut off a part of the Cathedral when erected, for their line, and took possession of it, but the plaintiffs, under the circumstances, declined to sell, or convey, or arbitrate as to the value of anything less than the whole block.

In an action to compel the railway to take the whole and desist from their proceedings as to part only, it was *held*, that the block of land was set apart for Cathedral purposes, and had not, by any default of the plaintiffs, lost that distinctive ecclesiastical character, and an injunction was granted against the railway taking a part only, as in *Sparrow v. Oxford, etc., R. Co.*, 2 D. M. & G. 94.

It was also contended by the plaintiffs that the defendants having taken possession could not withdraw, but must not take the whole block. *Held*, that the mere going into possession of part, although a high-handed act on the part of the defendants, did not necessarily commit them to the purchase of the whole, and that the defendants should have the option to take the whole or withdraw, and pay all damages and costs sustained by the plaintiffs.

THIS was an action brought by the plaintiffs to restrain the defendants from taking a part only of the Cathedral block in the city of London for the purposes of their railway.

The statement of claim set out the incorporation of the plaintiffs under 37 Vic. ch. 91 (O.), and that they were the owners of the land in question: that before the construction of the defendants' railway was authorized, the plaintiffs had erected a Chapter House on the said premises as part of the cathedral referred to in the said act of incorporation, which building and land formed an entire messuage building and property, and were known as the Cathedral or Chapter House Block: that the defendants were incorporated under 49 Vic. ch. 70 (D.), and were subject to the Consolidated Railway Act of 1879, and acts amending it: that the defendants in pursuance of powers conferred upon them by said statutes, without leave or license, took possession of part of plaintiffs' said land,

pulled down fences, cut down trees, and made a cutting and embankment thereon: that when they so took possession they served a notice on the plaintiffs [setting out the usual notice to arbitrate under the Railway Acts for $\frac{445}{1000}$ of an acre, part of said cathedral block, and an offer of \$3,000 as compensation]: that the plaintiffs served a counter-notice under the Consolidated Railway Act of 1879 and amending acts, and particularly under sec. 15 of 47 Vic. ch. 11, that they declined to sell or give possession or proceed to arbitration upon such part of the land, but were willing to sell the whole: that notwithstanding such counter-notice the defendants insisted upon taking only such part of said land, and proceeded with the construction of their railway across said property, and would not take or pay for or arbitrate as to more than such part: that the whole of said block of land and buildings thereon formed one house or building within the meaning of the Consolidated Railway Act of 1879 and the amendments thereto, and the plaintiffs were able and willing to sell the whole but unwilling to sell a part only; and the statement of claim asked for a declaration that the defendants were bound to purchase the whole block, and for a mandatory order directing the defendants to take the necessary proceedings to entitle them to the whole, and to fix and pay the value thereof, and an injunction restraining the defendants from proceeding under their notice served as to part of the block.

The statement of defence denied that the part required by defendants formed part of a house, or other building, or manufactory within the meaning of the statutes in that behalf: alleged that the plaintiffs had abandoned their intention of erecting a cathedral upon the lands in question, and asserted that the plaintiffs were not able and willing to sell and give possession of the whole of the lands.

The action was tried at the Spring Sittings at London on March 10th, 1887, before Boyd, C.

It appeared at the trial that the Chapter House had been built in 1873, but no other part of the Cathedral had been afterwards erected, nor funds collected for the purpose. The project had, however, never been abandoned, and merely remained in abeyance for want of funds, but no intention of proceeding with it in the near future was shown.

Hellmuth for the plaintiffs.

W. R. Meredith, Q. C., and *Cronyn* for defendants.

BOYD, C.—Clause 2 of sec. 100 of the Dominion Railway Act reads thus: "No person shall, at any time, be compelled to sell or convey or give possession of, to any company, a part only of any house or other building or manufactory, if such person is willing and able to sell and convey and give

DOMINION RAIL-
WAY ACT—CON-
STRUCTION.

possession of the whole thereof." R. S. C. ch. 109, vol. ii., p. 1512. This language is identical in meaning with, though not literally the same as, the English original to be found in sec. 92 of the Lands Clauses Consolidation Act, 1845 (8 Vic. ch. 18). The terms "house," "building," "manufactory," are to receive, therefore, substantially the same meaning as the English judges have put upon the same words in the section of the Lands Clauses Act. "House" has been held to mean that which is a house both in the ordinary and legal sense, *i.e.*, the house and curtilage and garden and all that is necessary to the equipment of the house. "Building" is held (in extension of the meaning) to include any erection which is in the nature of a house, and so "manufactory" applies to a third class of structure which may be house and may be building and may be something more.

No part of the section is to be so read as to diminish any other part. Each thing described is different from the others, and it is not circumscribed by the description of any of the others. *Per* Brett, L. J., in *Richards v. Swansea Improvement and Tramways Co.*, 9 Ch. D. 434.

The Dominion Legislature having by 47 Vic. ch. 11, sec. 15, incorporated in our law the provisions of sec. 92 of the Lands Clauses Act, the effect is to embody it, as judicially interpreted in England, according to the views enunciated in *Trimble v. Hill*, 5 App. Cas. 342.

To determine the main question now in litigation it is only necessary to refer to two or three cases which show the scope of the section in circumstances not unlike the present.

The railway was enjoined against taking less than the whole in AUTHORITIES EXAMINED. Lord Robert Grosvenor v. Hampstead Junction R. Co., 1 DeG. & J. 446. They had proposed to take a piece from the corner of land belonging to trustees of almshouses intended to be, but as yet only in part erected, which piece would before completion of the buildings in accordance with the designs have been part of the garden in front of the almshouses. In that case it appears from the report in the Jurist that the building operations had been, as here, suspended for want of funds (3 Jur. N. S. 1085).

A like case was *Alexander v. Crystal Palace R. Co.*, 30 Beav. 556, where the land in question lay in front of houses in the course of erection, which land it was intended to attach to the houses as gardens.

Governors of St. Thomas's Hospital v. Charing Cross R. Co., 1 J. & H. 400, was the case of taking a part of the detached wing of a hospital and the garden of the hospital, although both were modern additions to an ancient edifice. See, also, *Cole v. West London, etc., R. Co.*, 27 Beav. 242.

The defendants have taken a strip of land, from the south-west side of the "Cathedral block" in the city of London, which is described and recognized as having that character by 37 Vic. ch. 9 (O.), being an "Act to incorporate the Cathedral of Holy Trinity of London." The whole property is enclosed by one fence and is bounded on three sides by public streets. Upon the property is erected the Chapter House, which was intended to be a part of and united to the Cathedral building proper. Upon the delineation of the ground plans the strip taken by the railway will cut off a part of the projected main edifice, so that the contemplated scheme will be directly interfered with by the invasion of the railway. The Act incorporates the Bishop and the Dean, Archdeacons, and Canons for the time being of the Diocese of Huron; that is to say, the Bishop and Chapter form the corporation, and the part of the building already erected is for the Chapter House. This is an adjunct to the Cathedral and is in the statute regarded and treated as the commencement of the erection of the cathedral buildings. The Chapter House is the place of meeting and for the use of the clergymen and others who with the Bishop form a diocesan body, and it appears to be necessary to give completeness to the constitution of an episcopal see.

FACTS CONCERN-
ING THE CATHE-
DRAL.

The Cathedral is the Bishop's church outwardly indicated by his official seat (*cathedra*) being placed there. Such is the present position of the Chapter House which was established as "The Pro-Cathedral" by Bishop Hellmuth, and no alteration has been since then made in this regard, though a change is contemplated by the present Bishop by which the dignity is to be transferred to St. Paul's Church. Such a change, however, is not final, and the original purpose, contemplated by the statute, may be hereafter resumed by any incumbent of the episcopal office. I must, in law, regard this block of land as set apart for cathedral purposes, on which there is already erected part of the cathedral buildings, and which has not by any act or default of the corporation yet lost this distinctive ecclesiastical character.

The present occupation of parts of the Chapter House and of the grounds is quite consistent with the ultimate purpose of the corporation, and all the holdings and tenant arrangements are in subordination to the main scheme for which the block is held under the statute. On this first point my conclusion is against the railway.

The next question is, as to the form of relief. The plaintiffs insist that the company cannot withdraw or desist, but must be compelled to take and pay for the whole cathedral block. I am not able so to view the position of the parties, and though the railway has taken possession of the land and done some work thereon, I think they have yet the right to resile.

RIGHT OF COM-
PANY TO WITH-
DRAW.

The point would be plain enough if the company had not entered upon the land.

In *King v. Wycombe R. Co.*, 28 Beav. 104, notice having been given to take part by the company, and the owner requiring the company to take the whole, it was held that the company might abandon the notice and refuse to take any part, the owner not having been in the least disturbed. That case is not cited, but the same result is reached in *Grierson v. Cheshire Lines Committee*, L. R. 19 Eq. 83, where Bacon, V. C., explains the earlier decisions in *Marson v. London, etc., R. Co.*, L. R. 6 Eq. 101, and s. c., 7 Eq. 546, upon which the plaintiffs relied before me. But the mere going into possession, which appears to have been a high-handed act on the part of the railway, should not necessarily commit them to the purchase of the whole. The entry had reference only to a desire to purchase the strip delineated on the plans—no more. Had the plaintiffs accepted the notice to arbitrate for this, there would have been a consensus as to the quantity. But the plaintiffs reject the offer and make the counter-claim that all should be taken, or none. To this the company sent a refusal, so that the parties were not at one, and it would be an arbitrary proceeding to declare that the company must now purchase the whole whether they will or not.

The option to take the whole still remains with the company. If they do not upon the declaration I now make that the plaintiffs were not compelled to sell part, elect to take the block, they must withdraw and pay all damages and costs sustained by the plaintiffs—to be ascertained by the Master. This election to be made in ten days after judgment. Apart from the equitable view in which I have placed the matter, I think that the clause as to desistance, sec. 8, sub-sec. 26 (p. 1469), applies with peculiar propriety to such a state of facts as we have here.

In *Grimshawe v. Grand Trunk R. Co.*, 15 U. C. R. 224, Robinson, C. J., thought that there was power to withdraw even after possession taken: *a fortiori* should this be permissible where the possession is of merely a part, and having reference only to that part, and it is proved that the proprietor objects to the company having that part unless on condition of taking the whole.

The objection that the plaintiffs are unable to convey is answered by the case in 1 J. & H. 410, and coupled with the declaration there will be an injunction against taking part only, as in *Sparrow v. Oxford, etc., R. Co.*, 2 DeG. M. & G. 94.

Costs to the plaintiffs, and if necessary a reference as to damages.

OHIO AND MISSISSIPPI R. Co.

v.

PEOPLE.

(Advance Case, Illinois. September 27, 1887.)

The defendant company erected a fence ten feet within and upon its right of way, and that distance from the adjoining owner's land. The statute (Rev. St. c. 114, § 48) provides that "every railroad corporation shall . . . erect and maintain fences upon both sides of its road," etc. *Held—*

1. That the fence constructed was not in compliance with the statute, but the fencing should embrace the entire right of way.

2. That *mandamus* is the proper proceeding to compel a railroad company to construct its fences in compliance with the provisions of the statute.

APPEAL from appellate court, third district; JAMES A. CREIGHTON, Judge.

The petition in this case is for a *mandamus*, and was exhibited in the name of the people on the relation of John S. Lyman against the Ohio & Mississippi R. Co., to compel respondent to erect a fence on the south line of its right of way through lands owned by relator, over and upon which its track is constructed. Omitting the formal facts, the following are the principal allegations contained in the petition: "That the Ohio & Mississippi R. Co., some years since, constructed its railway across and over said lands of petitioner, leaving a portion thereof upon the north and south of its right of way and track. That said railway company has been in operation through the county of Sangamon and over said land of petitioner, running its trains and engines and cars over its track through the same for several years past. That it has not constructed fences upon the sides of its road through petitioner's land, as required by law. That petitioner has never waived or compromised the building of the same by said road; but, on the contrary, several weeks since served upon said railroad company notice in writing to build and maintain a fence upon the south side of its road, where the same goes through said petitioner's farm, within thirty days from the service of said notice. That said time has long since elapsed, and said railway company has failed to comply therewith, but has neglected and refused to erect a fence upon the south side of its road, where the same crosses petitioner's said land. But, on the contrary, petitioner states to the

court that said railway company, about the time said notice expired, and just when it had the material upon the ground and workmen ready to erect said fence, and in order to vex and annoy and injure said petitioner, and to evade the law with reference to its duty in the premises, demanded of petitioner that he should help pay the expenses of erecting said fence upon the side of its said road. And petitioner further states that, upon his refusal to do so, said railway company threatened and did erect said fence ten (10) feet north of the south side of its said road, and that distance within the south line of its right of way. And petitioner further states that said railroad company has completed said fence within the side of its road as aforesaid, and since doing the same has cut away and removed its hedge and fence at the ends of petitioner's said tract of land, where said road enters and goes out at the same, and between said fence, which it has so erected as aforesaid, and petitioner's land, thereby exposing petitioner's said land to the trespassing of stock from the highway at one end, and the egress of petitioner's stock upon said highways, and also exposing petitioner's stock to said company's track at the other end of said fence; and has forbidden petitioner from inclosing his said land upon said new fence erected by said railroad company, and forbidden his entering upon their ten feet of right of way thrown out by them as aforesaid, for the purpose of inclosing upon their said new fence. Petitioner further avers that by an act of the legislature of Illinois in relation to fencing and operating railroads, approved March 1, 1874, in force July 1, 1874, it became and was the duty of said railway company, after the service of notice as aforesaid by petitioner to build said fence upon the side of its said road, to have built the same upon the line between said railway company's right of way and petitioner's said land, so that petitioner might have joined his fence thereto, and inclosed his said land thereon. And petitioner avers it is still the duty of said railway company to build and maintain a fence upon said line, such as required by said act, and by said notice from petitioner. Wherefore petitioner asks the aid of the court in the premises, and to that end makes said railway company defendant."

Respondent filed a general demurrer to the petition, and assigned the following grounds of demurrer: First, that the said petition does not state facts sufficient to authorize the issuing of the writ of *mandamus* as prayed for. Second, that the right sought to be enforced is created by statute, and the statute provides an adequate remedy which is exclusive. The demurrer was overruled, and on respondent electing to stand by its demurrer, the court rendered judgment awarding a peremptory *mandamus* to issue as prayed for in the petition. That judgment was afterwards affirmed in the appellate court of the third district, and respondent asked for and

was allowed an appeal to the supreme court, which it afterwards perfected by giving the usual bond.

Pollard & Werner for appellant.

Connolly & Mather for appellee.

SCOTT, J.—Section 1 of the act of the general assembly in relation to “fencing and operating railroads,” in force July 1, 1874, provides: “That every railroad corporation shall, within six months after any part of its line is open for use, erect, and thereafter maintain, fences on both sides of its road, or so much thereof as is open for use, suitable and sufficient to prevent cattle, horses, sheep, hogs, or other stock, from getting on such railroads, etc., with gates or bars at farm crossings of such railroads, which farm crossings shall be constructed by such corporation when and where the same may become necessary for the use of the proprietors of the lands adjoining such railroads.” Two questions are made on this record: First, whether, under the provisions of the statute cited, it is the duty of the railroad company to construct a line of fence on the south line of its right of way where the same passes over and through the lands owned by the relator; and, second, can respondent be compelled to perform its statutory duty in that regard by *mandamus*? These questions will be considered briefly, in the order stated.

STATUTORY PRO-
VISIONS — THE
QUESTIONS
STATED.

It is not denied by the respondent, the statute imposes the duty to erect and maintain a fence on both sides of its road, suitable and sufficient to prevent stock from getting upon its railroad. Indeed, that duty was expressly recognized in this case; for when the company was notified by the relator to build a fence on the south line of its road where the same passes over and through his lands, it did construct a fence on its right of way 10 feet north of the south line of its right of way. The question now is whether a railroad company, in complying with the statute in question, may build a fence required thereby anywhere on its right of way, except on the line between its right of way and the adjoining owner's land; or, what is the same thing, is the fence now constructed, after notice given, 10 feet within and upon its right of way, and that distance from the adjoining owner's land, a compliance with the provision of the statute in regard to fencing railroads? It is thought it is not. The statute is so plain in this regard, it seems idle to attempt to construe it. It makes it the duty of the company to erect a fence on “both sides of the road;” that is, so as to embrace the right of way; and so this court has held, in *Railway Co. v. Zeigler*, 108 Ill. 304; s. c., 15 Am. & Eng. R. R. Cas. 519. In that case it was decided, a fence built two feet inside of the right of way was not constructed in conformity with the statute. The suggestion the

FENCE MUST BE
CONSTRUCTED ON
THE LINE.

"sides of its road" may mean the mere "track" upon which trains are moved, is too absurd to be seriously considered.

The second point presents some difficulty, and is not altogether free from doubt. The insistence is, as the statute which imposes the duty upon a railway company to erect fences on the "sides of its road," gives the adjoining land owner the privilege, MANDAMUS THE PROPER REMEDY. on the failure of the company after notice, to construct the fence himself, and recover double its value with interest, that the remedy so provided is exclusive. It is doubtful whether the adjoining land-owner, under the facts in this case as they appear on demurrer to the petition, would have the right or privilege to construct a fence on the south line of respondent's right of way. It is seen the company, in compliance with the notice given, did construct a fence on its right of way. The complaint is not that the company did not erect a fence when notified to do so, but that it did not erect it on the south side of its right of way, as it was its duty to do. The statute does not contemplate there may be two fences erected on the right of way on the same side of the track. That would render it difficult, if not impracticable, for the adjoining land-owner to have the privilege of the farm crossing. The statute declares he may have, and which is necessary in this case, as the relator's land lies on both sides of the right of way. The remedy given the land-owner to erect a fence and recover for it, under the statute, does not seem to be applicable; and, it would seem, the only remedy left the land-owner, under the facts in this case, is to compel the company to perform the duty it has undertaken, in compliance with the provisions of the statute. That can only be done by *mandamus*, and such is an appropriate remedy. Had the company refused to erect the fence after notice, then, and not till then, the contingency would have arisen in which the land-owner might have erected the fence, and recovered the statutory penalty. But that it did not do; and it would seem to follow, the most complete, if not the only, remedy the land-owner would have, would be to compel respondent by *mandamus* to erect the fence required by the statute, in the manner it contemplates shall be done, viz., on the south line of its right of way. Placing the fence where it is according to the allegations of the petition, which, of course, the demurrer admits to be true, is mere captious conduct, to avoid a plain and obvious statutory duty, which the law will not tolerate. Not to prevent such conduct would be to allow the corporation by a mere trick to defeat the statutory rights of the adjoining land-owner. Corporations, like individuals, ought to observe good neighborhood; and if they will not voluntarily square their conduct to such a rule, they should be compelled to do so.

But there is another view to be taken. Section 9 of the "Act to

revise the law in relation to *mandamus*” (Rev. St. 1874) provides: “The writ of *mandamus* shall not be denied because the petitioner may have another specific legal remedy, when such writ will afford a proper and sufficient remedy.” Under this statute it has been held by this court, and the supreme court of the United States, the inquiry whether there may be another or even a better mode of redress than the one asked for does not arise, and so the rule is now well settled that *mandamus* will lie in all cases where it affords a proper and sufficient remedy for the enforcement of a legal right or an obvious duty, the performance of which involves the exercise of no discretion, without regard to whether there may be some other adequate remedy or not. *People v. Village of Crotty*, 93 Ill. 180; *Lower v. U. S.*, 91 U. S. 536. Here, it was the plain duty of respondent, when it undertook to build the fence in compliance with statute, after notice, to build on the line between its right of way and the land of relator. In no other way could it comply with the statute; and *mandamus* is an appropriate remedy to compel the performance of the legal duty in that respect.

The judgment of the appellate court will be affirmed. Judgment affirmed.

Fences as an Element of Damage in Eminent-domain Proceedings.—See this subject reviewed in note to *Centralia*, etc., *R. Co. v. Rixman*, *supra*, p. 836.

LONG DOCK Co. *et al.*

v.

MORRIS AND ESSEX R. Co. *et al.*

(*Advance Case, New Jersey. January 12, 1887.*)

The Long Dock Co. was the owner in fee, and the Erie R. Co. the lessee, with the option of purchase, of certain lands which the Morris & Essex R. Co. was desirous of acquiring for its use, and which it had the power to condemn. An agreement was entered into by which they agreed to sell to the M. & E. Co. the land at a price to be fixed by condemnation proceedings. The proceedings in condemnation were taken, the damages assessed, and a deed was tendered to the M. & E. Co., who refused to pay the money without a release of the mortgage incumbrances on the property. The lease was given in 1856. The following mortgages were on the property: two by the predecessor of the Erie Co.—one in 1858 and one in 1859, both passing after-acquired property; one in 1868 by the Long Dock and Erie companies, which allowed them to sell the tract condemned free of the lien, on applying the pro-

• 432 LONG DOCK CO. *et al.* v. MORRIS AND ESSEX R. CO. *et al.*

ceeds to a sinking fund; other two by the Erie Co.—one in 1870 and one in 1874; two by the N.Y., L. E. & W. R. Co.—one in 1878, the other after 1868; and two other small mortgages. In an action brought to compel the Morris & Essex Co. to accept the deed and pay the money, the parties interested in the mortgage answering and submitting their rights to the court, it was *held*—

1. That so much of the award as was for the interest of the Long Dock Co. was applicable to the two small mortgages, and the mortgage (not yet due) of 1868.

2. That so much as was for the lessee's interest was applicable to the other mortgages (not yet due), in their order of priority.

3. That the deed be accepted, and the award paid into court, to be turned over to the Long Dock Co., upon proof being made of a proper investment for the sinking fund as required by the mortgage of 1868.

A provision in a railroad mortgage for the expenditure of money received from the sale of part of the property clear of the mortgage is not complied with by the expenditure of other money before the receipt of the purchase-money of the property sold, unless it was expended under circumstances such as to connect the antecedent expenditure and the purchase-money together in such a way as to show that the expenditure was made with the expectation of reimbursement out of the purchase-money, and in reliance upon the receipt thereof for that purpose.

BILL for relief. On final hearing on pleadings and proof.

Cortlandt Parker for complainants.

J. D. Bedle for defendants.

RUNYON, Ch.—In 1884 the Morris & Essex R. Co., being desirous of acquiring for its use certain land which it had the power to condemn, agreed with the Long Dock Co., the owner of the fee therein, and the Erie R. Co., the lessee thereof, under a lease from the Long Dock Co., to the New York & Erie R. Co., the predecessor of the Erie R. Co., and to whose rights under the lease the last-named company succeeded, for the purchase thereof. By the agreement the Long Dock Co. and the Erie R. Co. agreed to sell the land to the Morris & Essex R. Co., at a price to be fixed by proceedings to be taken by that company for the condemnation thereof. The Morris & Essex R. Co., with the consent of the other two companies, entered at once into the possession of the property. The proceedings in condemnation were taken by the Delaware, Lackawanna & Western R. Co., lessee of the Morris & Essex R. Co., and the price of the land and the damages for the taking thereof were fixed therein at \$70,470. Subsequently the Long Dock Co. and the Erie R. Co. and Hugh J. Jewett, receiver, appointed by this court for the creditors and stockholders of the latter company, executed a deed for the property (the receiver having duly obtained permission from this court to do so) to the Morris & Essex R. Co., and tendered it, on or about the first of November, 1877, to that company, and demanded payment, but it refused to pay the money on the ground that it could no

safely do so without a release of the mortgage incumbrances upon the property. This suit is brought to compel the Morris & Essex R. Co. and the Delaware, Lackawanna & Western R. Co. to accept the deed, and pay the money, with the interest thereon, to the Long Dock Co.

The defendants are the Morris & Essex R. Co., the Delaware, Lackawanna & Western R. Co., and the holders of the mortgages upon the property. None of the holders of the mortgages object to the payment of the money to the Long Dock Co. Those of them that have answered submit their interest in the matter to the decision of the court. The property is covered by two small mortgages, and by a mortgage for \$3,000,000 and interest, given May 25, 1863, by the Long Dock Co. and the Erie R. Co. to John Earl Williams and Dudley S. Gregory, trustees. These are two mortgages given by the New York & Erie R. Co., and held by J. Bancroft Davis as surviving trustee, one given in 1858, and the other in 1859; two given by the Erie R. Co. to the Farmers' Loan & Trust Co., as trustees, one in 1870 and the other in 1874; and another given in 1878 to that company by the New York, Lake Erie & Western R. Co., the successor of the Erie R. Co.; and another also given after the mortgage of 1863 by the same company to the United States Trust Co.

The mortgage given by the Long Dock Co. and the Erie R. Co. declares that it is provided and agreed between the parties thereto that the Long Dock Co. reserves and retains for itself, to be exercised by the consent of Erie R. Co., and also reserves for that company (which is to have the right when it shall become the owner of the mortgaged premises), the right to sell, release, and dispose of, free from the lien of the mortgage, any part of the land covered by the mortgage not occupied by or (in the opinion of the Erie R. Co.) needed for the track or depot of that company, or the ferry to be maintained over the Hudson river; and that any conveyance of the lands which the Long Dock Co. is thereby permitted to convey, free from the mortgage made, with a recital or covenant that the land is conveyed or released free from the lien of the mortgage (and it is declared and provided that no other conveyance whatever shall convey the lands free from such lien), shall convey the land free and discharged of any lien created by the mortgage; and that as to such land the mortgage shall thereafter be void, except as in the conveyance may be provided. And the Long Dock Co. and the Erie R. Co. thereby bind themselves that in case and whenever any of the lands shall be conveyed or released by virtue of those provisions, free from the lien of the mortgage, they will apply the proceeds of the sale to the purchase and extinguishment of the bonds secured by the mortgage, or of 500 prior bonds thereinbefore referred to (secured by a

mortgage made in 1857), or invest them in trust upon good and sufficient securities by bond and mortgage upon real estate worth double the sum loaned, or in the public stocks or bonds of the United States, or will purchase therewith other lands or real estate as authorized by their charter, which lands and real estate shall forthwith be mortgaged to secure the payment of the bonds before mentioned, or will expend them in making improvements upon the other mortgaged land not released from the mortgage; and it is further provided that such money, when so invested, and the proceeds thereon, shall form a sinking fund for the payment and purchase or security of the bonds thereby secured, or of the other 500 bonds, and for no other purpose whatever. It is also provided that the proceeds may be applied to the extinguishment of any liens which may be then unreleased upon the mortgaged premises.

The complainants allege in the bill that, expecting to receive the money awarded for the property and damages in the condemnation proceedings, they expended about the time of the date of the deed they tendered, and since that time, a sum of money larger than the sum awarded, viz., over \$300,000, in making improvements upon the unreleased and unreleasable part of the mortgaged premises; and they claim that, having so made such expenditures, they are entitled to receive the amount of the award, with the interest thereon. It appears by the evidence that, since the making of the award, the complainants have indeed expended a large sum of money in improvements upon the rest of the mortgaged premises, but it does not appear that such expenditure was made in the expectation of receiving the money due upon the award. The provision in the mortgage for the expenditure of money, received from the sale of property clear of the mortgage, obviously and by its terms contemplates the expenditure of the money after it shall have been received, and it cannot be held to have been complied with by the expenditure of other money before the receipt of the purchase money of the property sold, unless it was expended under circumstances such as to connect the antecedent expenditure and the purchase money together in such a way as to show that the expenditure was made with the expectation of reimbursement out of the purchase money, and in reliance upon the receipt thereof for that purpose. This case shows no such circumstances. For aught that appears, the expenditure was made without regard to the receipt of the money in question.

The mortgages of 1858 and 1859, given by the New York & Erie R. Co. to James Brown and John C. Bancroft Davis, trustees, were, as before stated, made before the mortgage from the Long Dock Co. and the Erie R. Co. to John Earl Williams and W. S. Gregory, which was made in 1863. They embrace by their terms after-acquired property, and the other mortgages subsequent to the

mortgage of 1863 cover the rights of the mortgagors in and to the premises mentioned and described in that mortgage. The Long Dock Co., being the owner of the mortgaged premises, made this lease before mentioned to the New York & Erie R. Co. in 1856. The lease passed as after-acquired property under the mortgages of 1858 and 1859. So much of the award as is for the interest of the owner of the fee in the land is applicable to the two small mortgages given by the Long Dock Co. upon the property prior to the lease, and then to the mortgage given by the Long Dock Co. and the Erie R. Co. So much of the award as is for the lessee's interest in the property is applicable to the other mortgages in the order of priority.

Those mortgages are all upon the interest of the lessee. It is said that the 500 bonds mentioned in the mortgage from the Long Dock Co. and the Erie R. Co. have been paid. The two small mortgages may be paid off out of the money, and inasmuch as the other mortgages are not yet due, and the answering defendants submit their rights in the premises to the determination of this court, it will be decreed that the deed from the Long Dock Co. be accepted by the Morris & Essex R. Co., and that a part of the provision made in the mortgage given by the Long Dock Co. and the Erie R. Co., and hereinbefore stated, for the appropriation of the purchase money of property sold free from the lien of the mortgage, be adopted in disposing of the money awarded in the proceedings for condemnation, or so much thereof as may remain after paying the two small mortgages. The money must be invested in trust, upon good and sufficient securities of bond and mortgage of real estate worth double of amount loaned, or in the public stocks or bonds of the United States, such investment to be held as a sinking fund to be applied to the payment of the remaining mortgages in accordance with the equitable rights of the mortgagees in the fund, or the Long Dock Co. may expend the money in improvements of the value thereof upon the remainder of the mortgaged premises. The money should be paid into court, to be paid out for such investment, or when a master to whom the matter may be referred shall have reported, and the report shall have been duly confirmed, that such improvements have been made. The Morris & Essex R. Co. and its lessee have had possession of the property from the time of the date of the award. They should pay interest at the legal rate for the time being thereupon. Upon the delivery of the deed, they should pay the money into court. No costs of this suit will be awarded to either side.

Condemnation of Mortgaged Property.—RIGHTS OF MORTGAGEE.—Property subject to a mortgage, like all other property, is liable to be taken for public use upon compensation being made. *Ala. & Florida R. Co. v. Kenney*, 39 Ala. 807.

Rights of Mortgagee to Notice.—Generally, if the mortgagor alone is notified of the condemnation proceedings, the title of the mortgagee is not divested. *Severin v. Cole & B. C. R. & M. R. Co.*, 38 Iowa, 468; *Wilson v. E. & N. A. R. Co.*, 67 Me. 358; *Bright v. Platt*, 32 N. J. Eq. 371; *Michigan Air Line v. Barnes*, 40 Mich. 388; *Hagar v. Brainard*, 44 Vt. 294; *Warwick Institution v. City of Providence*, 12 R. I. 144.

Compare *Farnsworth v. Boston*, 126 Mass. 1; *Breed v. Eastern R.*, 5 Gray (Mass.), 470, note; *Schuylkill Nav. Co. v. Thoburn*, 7 S. & R. (Pa.) 441.

Under a provision in a railroad charter requiring notice in condemnation proceedings to be given to "the persons interested," a mortgagee of the lands condemned, if not notified, is not bound by the proceedings. *Platt v. Bright*, 29 N. J. Eq. 128; *State Nat. R. Co. v. Easton & Amboy R. Co.*, 7 Vr. N. J. 182.

In *Severin v. Cole & B. C. R. & M. R. Co.*, 38 Iowa, 468, notice of the condemnation proceedings was given by the railroad company to the mortgagor alone. The statute required the commissioners to give the owner of the real estate five days' notice before proceeding to assess the damages. *Held*, that an owner of real estate is any person who has an equitable right to or interest therein, and that a mortgagee is such person, and that the proceedings without notice to him did not defeat his paramount title.

In *Cool v. Crommet*, 18 Me. 250, the court held that notice given either to the mortgagor or mortgagee in the actual possession of the land is sufficient. But in *Wilson v. E. & N. A. R. Co.*, 67 Me. 358, it was held that the mortgagee is entitled to notice, whether he is in or out of possession. In the case last cited, Peters, J., observes: "We think a mortgagee should be notified and made a party to the proceedings, and that the railroad company takes the risk of a want of notice if none is given. Practically, however, in many cases the necessity of notice is avoided; as where the mortgagee waives the damages, being satisfied with his security upon the land that is not taken; or where the damages are awarded to the mortgagor and are paid over to the mortgagee upon his receipt or release therefor. And we have no doubt a mortgagee might resort to proceedings in chancery to recover the damages awarded to the mortgagor. But the railroad corporation must see that the mortgagee is somehow paid or satisfied for the land taken so far as covered by the mortgage."

In *Warwick Institution v. City of Providence*, 12 R. I. 144, the city condemned as a public highway a strip of mortgaged land. The mortgagee was not notified of the proceedings or made a party thereto. The statute required that notice should be given to all persons interested in the land. After condemnation, the mortgagee sold the balance of the mortgaged premises under the power contained in the mortgage, but the proceeds were not sufficient to satisfy his claim. He then filed a bill in equity against the city and the mortgagors praying for a foreclosure of his mortgage on the strip of land taken for a highway. *Held*, that the mortgagee's interest was not legally condemned, and he was entitled to the relief prayed for.

Right of Mortgagee to be made Party to Proceedings.—The mortgagee of land condemned by a railroad company is generally entitled to be made a party to the condemnation proceedings. *Dodge v. Omaha, etc., R. Co.*, 20 Neb. 276; s. c., 28 Am. & Eng. R. R. Cas. 260; *Michigan Air Line Co. v. Barnes*, 40 Mich. 388; *Wade v. Hennessy, etc., R. Co.*, 55 Vt. 207; s. c., 14 Am. & Eng. R. R. Cas. 472; *Warwick Institution v. City of Providence*, 12 R. I. 144; *Davis v. La Crosse, etc., R. Co.*, 12 Wis. 16; *Gerrard v. Omaha, etc., R. Co.*, 14 Neb. 270; s. c., 10 Am. & Eng. R. R. Cas. 506; *Mutual Life Ins. Co. v. Easton & Amboy R. Co.*, 38 N. J. Eq. 182; s. c., 17 Am. & Eng. R. R. Cas. 78. See, however, *Breed v. Eastern R.*, 5 Gray (Mass.), 470; *Farnsworth v. Boston*, 126 Mass. 1, 9; *Schuylkill Nav. Co. v. Thoburn*, 7 S. & R. (Pa.) 441.

All parties interested in the land or who may be entitled thereto should be brought before the court. *Davis v. La Crosse, etc., R. Co.*, 12 Wis. 16. So in *Gerrard v. Omaha, etc., R. Co.*, 14 Neb. 270, it was held to be the duty of the railroad company to bring in all parties having an interest in the estate, in order that the condemnation money may be properly applied.

In *Michigan*, mortgagees must be made parties to the condemnation proceedings. A discontinuance as to a mortgagee, without adjudicating on his rights, is fatal to the proceedings. *Michigan Air Line R. Co. v. Barnes*, 40 Mich. 383.

In *Bright v. Platt*, 32 N. J. Eq. 371, Dixon, J., said: "By not making (the mortgagees) parties to the condemnation proceedings, as might have been done by notice, the company incurred a double risk. In the first place, if the fund had been paid over to these appellants (the mortgagors) under circumstances which did not create an equitable estoppel in favor of the company against the other parties interested, the company might be compelled again to pay for the rights which they would thus have attempted to acquire without compensation to the persons entitled thereto; and, in the next place, these parties, if dissatisfied with the award so made, might have insisted upon another appraisalment by commissioners, of whose proceedings they should have due notice."

The objection that a mortgagee has not been made a party to the proceedings by the mortgagor for the assessment of damages is removed where the mortgagee has given his assent thereto by a writing filed in the case. *Meacham v. Fitchburg R. Co.*, 4 Cushing (Mass.), 291.

Right of Mortgagee to the Damages.—Where the statute provides for the payment of damages to the "owners of the land," a mortgagee is included under this term. *Bank of Auburn v. Roberts*, 44 N. Y. 192; *Wilson v. European, etc., R. Co.*, 67 Me. 358; *Michigan, etc., R. Co. v. Barnes*, 40 Mich. 383.

In *New York*, the mortgage is treated as an assignment of the damages. The damages, or so much thereof as may be necessary to satisfy the mortgage, should be paid to the mortgagee. *Bank of Auburn v. Roberts*, 44 N. Y. 192; In the Matter of John and Cherry Streets, 19 Wend. (N. Y.) 659; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603.

Where property taken for a street is subject to a mortgage, it is the duty of the commissioners to award the sum allowed as damage to the mortgagee, or as much thereof as will satisfy the mortgage. In the Matter of John and Cherry Streets, 19 Wend. (N. Y.) 659.

"*Owners*" construed to include Mortgagees.—In *Maine*, the statute provides that "persons having any interest in land (taken for railroad) have the rights and remedies of owners to the extent of their interest." Held, a mortgagee whose mortgage is recorded has an interest as an owner within the meaning of this statute. *Wilson v. E. & N. A. R. Co.*, 67 Me. 358.

And in *New York*, an award of damages to "owners of property" depreciated will be construed to include mortgagees and other encumbrancers. *Bank of Auburn v. Roberts*, 44 N. Y. 192. In this case Leonard, C., said: "The mortgage should be regarded as an equitable assignment of so much of the damages awarded as will be required to satisfy a deficiency which may arise on a foreclosure sale."

In *Nebraska*, the word "owner" applies to all persons having an interest in the estate. *Gerrard v. Omaha, etc., R. Co.*, 14 Neb. 270; s. c., 10 Am. & Eng. R. R. Cas. 506. This is the rule also in *Iowa*. See *Severin v. Cole, etc.*, 38 Iowa, 463. The words "owners of such required land" include all owners of titles in or growing out of land whose rights are capable of actual privation by the taking. *Phila., etc., R. Co. v. Williams*, 54 Pa. St. 103.

Contrary Doctrine.—In *New Jersey*, however, the phrase "owners of land"

does not embrace a mortgagee, who is not an owner within the meaning of the statute. *Crane v. City of Elizabeth*, 36 N. J. Eq. 339; *Wade v. Miller*, 3 Vr. (N. J.) 296; *Kircher v. Schalk*, 10 Vr. (N. J.) 335.

Where compensation is directed to be made to the owners of land, this does not require compensation to be made to mortgagees specifically. It is to include the value of all the interests burdened by the public easement, and is to be paid to the general owner of the land when no other claimant intervenes. If such owner ought not, in equity, to receive the fund, the court of chancery will, at the instance of any interested complainant, take charge of its proper distribution. *Crane v. City of Elizabeth*, 36 N. J. Eq. 339; *McIntyre v. Easton & Amboy R. Co.*, 11 C. E. Greene (N. J.), 425.

In *Massachusetts*, it is held that a mortgagee not in possession has not such an interest in the land as to entitle him to join with the owner in the petition for a jury to assess damages. *Farnsworth v. Boston*, 126 Mass. 1.

When land is taken for a public purpose, the damages for the taking are to be assessed to the owner of the equity of redemption, without regard to the question whether or not there are mortgages upon it. *Breed v. Eastern R.*, 5 Gray (Mass.), 470, note; *Farnsworth v. Boston*, 126 Mass. 1.

As between mortgagor and mortgagee there is but one estate, the damages to which must be assessed in gross, and the judgment for the amount recovered must be held in trust to be distributed according to the equitable rights of mortgagor and mortgagee, which are to be determined between themselves, and in which question the party taking has no interest. The mortgagee may, by proper proceedings, follow the money into the hands of the mortgagor; or he may prevent it from going into his hands. See opinion of Lord, J., in *Farnsworth v. Boston*, 126 Mass. 1.

In equity, the damages assessed to the owner of the land will be deemed to be land, and the mortgagee can follow such assessed damages and have the same applied to the payment of his mortgage. *Pond v. Eddy*, 113 Mass. 149.

In *Farnsworth v. Boston*, 126 Mass. 9, the owner and the mortgagee filed separate petitions to have their damages assessed, and both cases were tried together. The jury estimated the value of the land at a sum less than the mortgage and returned a verdict for the mortgagee for the assessed value. *Held*, that the proceedings were irregular, and that the mortgagee was improperly admitted as a party.

Pennsylvania.—In *Schuylkill Nav. Co. v. Thoburn*, 7 S. & R. (Pa.) 441, it was held that the mortgagor is the owner, within the meaning of the statute, so as to be entitled to sue for damages for injury to the land, and that the mortgagee could not interfere before judgment, but, it seems, might come in and claim afterwards, by motion to take the money out of court.

JUDGMENT OF FORECLOSURE.—The judgment of foreclosure, where the mortgage is paramount to the right of way, should direct the sale of the property subject to the right of way; and if that be insufficient to pay the mortgage debt, then the right of way should be sold either with or without the property, as would be most advantageous. *Severin v. Cole & B. C. R. & M. R. Co.*, 38 Iowa, 463.

In *Bright v. Platt*, 32 N. J. Eq. 362, a portion of certain mortgaged lands was condemned for the railroad company's use, without notice being given of the proceedings to the mortgagee. The mortgagee was satisfied with the damages awarded, and the money was paid into court. *Held*, that the mortgagee was entitled in equity to have the sum so awarded for the land applied towards the payment of his debt, and the rest of the mortgaged premises, subject to the rights of the railroad company, sold for the payment of the balance.

When the railroad company has purchased the land but neglected to have a mortgage lien discharged, if on foreclosure a sale of the remainder of the

mortgaged premises does not satisfy the mortgage, the company is entitled to relieve its land from the lien by paying its value at the time it was taken with interest. *Kennedy v. Milwaukee & St. Paul R. Co.*, 22 Wis. 581. The court, in this case, say: "This appears to us more just and equitable than to say that there shall be no apportionment of the lien, but that the holder of the mortgage may enforce it to the full amount of his debt by selling the road track, superstructure, and fixtures placed upon the land at great expense by the company." *Compare* *Mutual Life Ins. Co. v. Easton & Amboy R. Co.*, 38 N. J. Eq. 132; s. c., 17 Am. & Eng. R. R. Cas. 78. See also *Kendall v. Missisquoi, etc., R. Co.*, 14 Am. & Eng. R. R. Cas. 428, and note; *Wade v. Hennessey, etc., R. Co.*, 14 Am. & Eng. R. R. Cas. 472, and note.

FIRST NATIONAL BANK OF CLEVELAND *et al.*

v.

SHEDD *et al.*

(121 *United States Supreme Court Reports*, 74.)

In two suits for the foreclosure of two mortgages of an insolvent railway, which had, by amendments and cross-bills, become practically consolidated, the two sets of trustees, acting in harmony and good faith, and with the approbation of the holders of a majority of the bonds issued under each mortgage (but against the wishes and objections of persons holding a minority of one of the issues as collateral, and contesting the priority of lien as to some of the property and the legality of some of the issues of bonds), procured the entry of a decree which ordered a speedy sale of all the property covered by either or both mortgages, as being for the best interest of all concerned, but left the conflicting claims as to the priority of lien and the amount of bonds issued to be settled by a subsequent decree or decrees. *Held*, that the court below had power to make this decree; that it was a final decree from which an appeal could be taken to this court; and that it was right.

APPEAL from the circuit court of the United States for the western district of Pennsylvania.

On motion to dismiss, with which is united a motion to affirm.

John Dalzell and *R. B. Murray* for appellants.

Geo. T. Bispham, *Francis Rawle*, and *D. T. Watson* for appellees.

WAITE, C. J.—The facts on which these motions rest are as follows: The Shenango & Allegheny Valley R. Co. is a corporation organized under a charter granted by the State of Pennsylvania to build and operate a railroad from a ^{FACTS.} point of intersection or junction with the Erie & Pittsburgh

R., in the township of West Salem, in the county of Mercer, to Bear creek, in the county of Butler. In March, 1869, the directors of the company resolved to issue bonds to the amount of \$1,000,000, and secure them by a mortgage or deed of trust to Henry Rawle, trustee, on that portion of its road "constructed and to be constructed between the western terminus thereof at its junction with the Erie & Pittsburgh R., in West Salem township, Mercer county, and a point in Butler county forty miles southeastwardly from said western terminus, and to be denominated a first mortgage." Under this authority a mortgage or trust deed was actually executed to Rawle, as trustee, not only on this 40 miles of road, with its rolling stock and appurtenances, but also upon "any lateral or branch roads, with their appurtenances, that may hereafter be constructed by or come into possession of the company along the line of the aforementioned forty miles of main line or connected therewith, all of which things are hereby declared to be appurtenances and fixtures of the said railroad, and also all franchises connected with or relating to the said railroad, or the construction, maintenance, or use thereof, now held or hereafter acquired by the said party of the first part [the company], and all corporate and other franchises which are now or may be hereafter possessed or exercised by the" company. This mortgage was duly recorded, and all the bonds authorized were issued thereunder.

By an act of the legislature of Pennsylvania approved April 14, 1870, the company was authorized "to so extend their eastern terminus as to connect with the Allegheny Valley R., and to so extend the western terminus as to connect with any other railroad;" and by another act, approved March 7, 1872, "to construct three branches from their railroad as may be necessary and convenient for the development and transportation of coal, ore, limestone, and other minerals in the vicinity of their railroad, provided the said branches shall not exceed a distance of ten miles from the main line of said company." The main line of the road was afterwards extended from its eastern terminus to the Allegheny Valley R. on the east side of the Allegheny river, and from its western end to the Atlantic & Great Western R. near the town of Greenville, making the entire length of that line 47 miles. The company also built sundry branch roads, and on the first of July, 1877, it executed another mortgage or deed of trust to John H. Devereux, trustee, to secure another proposed issue of \$1,000,000 of bonds. This mortgage covered "the entire railroad, built and to be built, . . . from its junction with the Atlantic & Great Western R. . . . to the Allegheny Valley R. on the east side of the Allegheny river, together with all its branches, extensions, side tracks, switches, and turn-outs, built and to

be built, and also all the lands, rights, franchises, and appurtenances thereto belonging, . . . and also all the corporate rights and franchises of said railroad company;" but it was expressly made "subject to a previous mortgage on forty miles of the north-western end of the railroad aforesaid and its appurtenances executed to Henry Rawle, trustee."

Under this mortgage \$200,000 of bonds were issued, and \$175,000 in addition were placed with the following parties as collateral security for the following sums:

(1) First National Bank of Cleveland, Ohio.....	\$64,000	to secure	\$30,000
(2) Second National Bank of Erie, Pennsylvania.....	60,000	"	35,000
(3) First National Bank of Greenville.....	22,000	"	20,000
(4) Mahoning National Bank of Youngstown.....	16,000	"	10,000
(5) Wick Bros. & Co.....	5,000	"	2,500
(6) Thomas H. Wells.....	8,000	"	5,000

In all, bonds.....\$175,000 to secure \$102,500

On the fifteenth of March, 1884, Charles L. Young and Henry Tyler, subjects of Great Britain, claiming to be the owners of the \$200,000 of bonds issued under the Devereux mortgage, filed their bill against the railroad company in the circuit court of the United States for the western district of Pennsylvania to have a receiver appointed. This was done on the same day the bill was filed by the appointment of Thomas P. Flower receiver, and he was at once authorized to borrow \$100,000 upon his certificates, to be used in the payment of wages, interest, taxes, and other preferred claims. On the first of May, 1884, Devereux, as trustee under the second mortgage, filed his bill against the company in the same court, to foreclose his mortgage and asking the appointment of a receiver. To this the company filed an answer, June 26, 1885, substantially admitting all the averments in the bill, and setting forth the appointment of Flower as receiver in the suit of Young & Tyler. On the sixth of June, 1885, Rawle filed a petition in the suit of Young & Tyler, asking permission to sell under his mortgage; but on the thirty-first of July, 1885, the court, although of opinion that "an early sale of the railroad as an entirety would undoubtedly conduce to the benefit of its creditors," postponed the order asked for until a sale could be made under both mortgages, by the two trustees acting conjointly.

On the fifth of September, 1885, Devereux, by leave of the court, filed an amended bill, to which, in addition to the railroad

company, he made Rawle trustee, Flower, the receiver, the British & South Wales Railway Wagon Co., Limited, the Union Rolling-stock Co., Limited, and William A. Adams, defendants. In this amended bill it is averred that the Devereux mortgage is a first lien on all the main line of the company, excepting only "forty miles of said main line extending southeasterly from its junction with the Erie & Pittsburgh R. at Shenango," and "upon all the lateral branches of said road." The whole line, including the lateral branches, is stated to be 75 miles in length, and the part on which the Devereux mortgage is the first lien 35 miles. The prayer is for an account of the amount due on the bonds outstanding secured by the mortgages to Devereux and Rawle, respectively, the amount due on the receiver's certificates issued by Flower, the expenses of the receivership, and certain car-trust contracts, and also for a determination of the respective priorities of all the incumbrances and charges on the property, and for a sale of the mortgaged premises, free of liens, to pay the amounts found due in the order of their priority. This bill also prays the appointment of a receiver to take charge of the property and manage the business during the pendency of the suit. The British & South Wales Railway Wagon Co., the Union Rolling-stock Co., and William A. Adams answered, setting up certain car-trust contracts, which are immaterial on the present appeal. Devereux, the trustee, having died pending the suit, John M. Shedd was duly appointed in his place, and substituted for him as complainant, April 16, 1886.

On May 18, 1886, the First National Bank of Cleveland, the Second National Bank of Erie, the First National Bank of Greenville, the Mahoning National Bank, Wicks Bros. & Co., and Thomas H. Wells appeared in court, and on June 10, 1886, were permitted to intervene in the suit, *pro interesse suo*, because of averments in their petition that Shedd, the substituted trustee, "is committed to a course and is acting in a manner which is calculated to injure them in their security, in this, to wit: that there is on foot a certain scheme for the reorganization of said railroad company, which contemplates a 'united and friendly foreclosure' and sale of the entire road under the two mortgages named in plaintiff's amended bill, and this action now pending is to be used as the means of carrying forward said reorganization scheme in connection with certain proceedings to be instituted upon the mortgage in which Henry Rawle is named as trustee, and mentioned in plaintiff's said bill. That there are certain questions as to the extent of the lien of the said Rawle mortgage, and the number of the bonds outstanding, and the amount that is due thereon, which should be determined in this action, and which the petitioners are informed and believe that the said Shedd, trustee,

does not intend to raise, and which petitioners are informed and believe, if raised, will be determined against the validity and amount of a large portion of said bonds, but if left to the claim of the holders thereof and their trustee would amount to over one million dollars (\$1,000,000), and be made a charge and lien upon said premises superior to that of the bonds held by the petitioners; and there are also disputes as to the extent of the liens of the two mortgages, the said Rawle claiming a first lien upon the entire road, and the petitioners claiming that it is only a lien upon forty (40) miles of the main line, and that theirs is a first lien upon the entire balance. That petitioners are informed and believe that it is a part of said scheme to which said Shedd, trustee, is committed, to have the interest in said railroad covered by the conveyance to Devereux sold without a determination of these questions, and by so doing the petitioners say that the value of their security will be greatly diminished—first, by not being able to know the exact extent thereof; and, secondly, by being unable, by reason of the uncertainties existing as to the extent of their lien, to protect the property from being sacrificed upon sale; and, as to these matters, they beg leave of the court to refer for a fuller statement of the same to their pleadings allowed by the court to be filed in case No. 17, in equity, May term, 1884," the Young & Tyler suit..

On June 12, 1886, Rawle filed a cross-bill in which, after setting up the mortgage in his favor and the default of the company in the payment of interest on the bonds secured thereby, he asked to be permitted to sell the mortgage property free of all liens, and to bring the proceeds into court, to be distributed in accordance with the respective liens and priorities of the parties. On June 18, 1886, the railroad company answered both the amended and cross bills, and leaving the parties to litigate among themselves as to their respective rights under the mortgages, joined in the prayers that the property might be sold.

On June 26, each of the intervenors filed an answer to the cross-bill of Rawle, setting up their respective claims, and insisting that the lien of his mortgage should be confined to the 40 miles of main line included in the resolution of the company authorizing its execution. It is also insisted that the amount actually due upon the outstanding bonds is much less than \$1,000,000, for reasons which are specially stated, and "that owing to the disputes existing as to the amount of the first-mortgage bonds outstanding, and the extent of the lien thereof, and the dispute as to the extent of the lien of the second-mortgage bonds, and as disputes have arisen as to the amount and validity of the receiver's certificates, it is necessary, in order to protect its rights as lien creditor, to have a court of competent jurisdiction to determine the amount of said bonds outstanding, and the amount due thereon and the

extent of the lien thereof, as well as the amount and the extent of the lien of said second-mortgage bonds, as well as the amount and validity of the said certificates, before a sale of the said property."

"And the respondent respectfully represents that, if the property of the defendant company is sold before the validity and extent of said liens are judicially determined, bidding will be deterred on account of the risk and uncertainty, and the property will be in great danger of being sacrificed at said sale. Wherefore, your respondent prays that an accounting may be had and taken in the premises, that the amount of the bonds outstanding in the hands of *bona fide* holders for value may be determined; that the extent of the lien of each may be judicially determined, and upon the final determination of the matters, and not before, that an order of sale may be issued to sell the mortgaged premises; and for such other and further relief as may be just and equitable in the premises, and to your honors shall seem meet."

After these answers were in, both Shedd and Rawle, the trustees, moved the court for leave to sell the mortgaged property under their deeds of trust, and upon these motions, on July 13, the district judge, sitting in the circuit court, filed an opinion, in which the circuit judge concurred, as follows: "When this case was formerly before us, upon the petition of Henry Rawle, trustee, for leave to sell the Shenango & Allegheny railroad under the power of sale in the mortgage to him, we expressed the opinion that an early sale of the railroad as an entirety would undoubtedly conduce to the benefit of all its creditors. This opinion is greatly strengthened by what has since transpired. Under the operation of the receivership the financial condition of the company is constantly growing worse, and it is now entirely clear that the best interests of all parties concerned will be promoted by a speedy sale. In this view the creditors generally concur. The controlling objection to the sale as formerly proposed has been removed by the joint application of the trustees under the two mortgages to sell by virtue of the powers of sale conferred upon them respectively, they agreeing to unite in the sale so as to assure to the purchaser an undoubted title to the whole property, and to so conduct the sale as to secure the highest price attainable. We have no hesitation in finding, in the case of the Devereux-Shedd mortgage, that there has been a default in the payment of interest coupons for more than eighteen months, and that, by the election of one tenth in amount of the bondholders, the principal of the bonded indebtedness has become due and payable, and that by reason thereof the trustee is entitled to foreclose the mortgage or exercise his power of sale. The sale by the trustee will be under the control and subject to the approval of the court, and we can see to it that no unfair advantage is taken of the minority of the bond-

holders by reason of any improper combination among the majority or otherwise. The court having reached the conclusion that the mortgage trustees should be permitted to exercise their powers of sale under the direction of the court, it is to be hoped that the parties can speedily agree as to the manner in which the property shall be offered for sale; but, if they do not agree, we will hear them further upon that point before a decree is framed."

Pursuant to this decision a decree was entered on the fourteenth of October, as follows: "This cause came on to be heard . . . upon a motion by and on behalf of the said John M. Shedd, trustee, and also by and on behalf of the said Henry Rawle, trustee, that the court shall order and decree a sale of all and singular the property, real, personal, and mixed, of the Shenango & Allegheny R. Co., freed and discharged from all liens and incumbrances whatsoever; and also upon a motion made by and on behalf of the said John M. Shedd, trustee; and also by and on behalf of the said Henry Rawle, trustee, to the effect that each trustee shall be authorized and empowered, under and in accordance with the terms of his mortgage, to proceed and sell all and singular the property, real, personal, and mixed, covered by or included within his said recited mortgage, and upon a motion by and on behalf of both trustees for a sale of the entire property of the defendant company as incumbered and unable to pay the liens upon it, and so that the proceeds thereof may be distributed among the creditors entitled thereto. Due notice having been given to all parties in interest of these motions, and that the same would be heard, and the same having been already heard, all the parties in interest appearing by counsel and taking part in the argument, and the various papers and proceedings and record in the case of *Young v. Shenango & A. V. R. Co.*, now pending at No. 17, May term, 1884, of this court, as well as also all papers, affidavits and other proceedings in this case, and other documents, were produced, heard, and considered by the court in support of the said motions, and the court, after consideration, being of the opinion that it was to the best interest of all parties concerned that the said railroad, and all the property of the Shenango & Allegheny R. Co., should be sold as speedily as possible, and having filed an opinion to that effect, and the parties in interest being unable to agree upon the form of a decree directing said sale, and the court having fixed the thirtieth day of September, A.D. 1886, for settling the form of a decree, and counsel for all the respective parties having appeared and having been duly heard, and the court having considered the premises, do now order, adjudge and decree as follows." Then follows a detailed statement of all the property of the company, describing particularly its main line and branches, and also its lands, rolling stock, and other property. There is then a finding

of the execution of the two mortgages to Rawle and Devereux, the amount of bonds originally issued thereunder, and a default in the payment of interest such as would entitle the several trustees to take possession and sell under the powers vested in them respectively, and an adjudication that the trustees are severally "entitled to proceed and foreclose the said mortgage."

It was also found that the mortgages are each valid and existing liens on so much of the property "as was thereby lawfully conveyed to the said respective trustees, and which thereafter became vested in the said trustees, respectively, as after-acquired property, according to the terms of said mortgages, or either of them;" that all of the original issue of bonds under the Rawle mortgage was outstanding, with interest coupons attached, from October 1, 1884, and under the Devereux, \$375,000, and all the interest warrants from their date, but there is no finding of the amount actually due on either of the issues. It is also found that there are \$155,849.87 of receiver's certificates outstanding, on which interest is payable at the rate of 6 per cent per annum from their respective dates, and that these, "together with the costs, charges, and lawful expenses in this cause, and the costs, charges, and expenses of the liabilities of the receivership, including the costs in the case of *Young v. Shenango & A. V. R. Co.*, in this court, and all just and proper compensation, expenses, and allowances to the said receiver and the trustees under the said mortgages, and to any of the parties to the said cause, are entitled to be paid out of the proceeds of the . . . sale in the first instance," and in preference to the bondholders.

The decree then proceeds as follows: "(8) And this court does further find, adjudge, and decree that all the property, real, personal, and mixed, of the said Shenango & Allegheny R. Co. is subject to the lien of either the said mortgage to the said Henry Rawle, trustee, or to the said mortgage to the said John H. Devereux, trustee, as also to the outstanding receiver's certificates, and that there are conflicting claims in reference to the priority of liens, and their extent, and that there are conflicting claims between the said mortgagees and some of the bondholders in reference to the number of bonds legally outstanding and unpaid under the said respective mortgages to the said Henry Rawle, trustee, and to the said John H. Devereux, trustee, and also that there are conflicting claims in reference to the amounts of money due on the said respective bonds outstanding under the said mortgages, which the holders thereof are entitled to receive; and this court also finds that the Shenango & Allegheny R. Co. is insolvent, and that it would be to the best interests of all parties concerned that the said property, real, personal, and mixed, of the said defendant company should be sold; and it appearing to the said court that such sale by this court of the said property is prayed for under the

amended bill filed by the said John M. Shedd, trustee, and also in the cross bill filed by the said Henry Rawle, trustee, this court do now, upon motion of the solicitors for the said John M. Shedd, trustee, and also upon motion of the solicitors of the said Henry Rawle, trustee, the solicitors for the company and the receiver acquiescing herein, do now order, adjudge, and decree that the said Henry Rawle and John M. Shedd be, and they are hereby, appointed special commissioners by this court to make sale of all and singular the property, real, personal, and mixed, including the franchises of the said Shenango & Allegheny R. Co. Said sale shall be on the twenty-fifth day of January, 1887, at Shenango, the junction of the Shenango & Allegheny R. with the Atlantic and Great Western, now New York, Pennsylvania & Ohio R., near Greenville, Mercer county, Pennsylvania, at twelve (12) o'clock noon, and it shall be at public auction, and the sale shall be made to the highest and best bidder, and report thereof made to this court."

It is then ordered that the whole property be sold as an entirety, at not less than \$625,000, and that upon a confirmation of the sale the purchaser be entitled to a conveyance freed and discharged of the lien of the mortgages, receiver's certificates, costs, expenses, etc.; and the conclusion is as follows: "(13) All disputes and controversies between the two mortgage trustees, the said Rawle and the said Shedd, or the bondholders under the said two mortgages, touching the extent of the lien of the said mortgages, respectively, or the priority of the lien of the said mortgages, respectively, as well as all questions concerning and touching the amounts due bondholders, respectively, under the said two mortgages, are hereby expressly reserved for future consideration and determination unaffected by anything in this decree."

From this decree the intervenors alone have appealed, and that appeal Shedd and Rawle move to dismiss because it was "taken from an interlocutory decree or order of sale, and not a final decree." With this motion is also united a motion to affirm under rule 6, § 5.

The motion to dismiss is overruled, but the motion to affirm is granted. The appeal in its present form brings up for review the single question of the propriety of ordering a sale before the rights of the parties under the several mortgages have been fully ascertained and determined. All parties, including the mortgage trustees, are satisfied, except these appellants, who have been allowed to intervene *pro interesse suo*, and who represent but a small minority of the mortgage indebtedness. The only substantial issues presented by their answers relate to the extent of the priority of the lien of the Rawle mortgage, and the amount due on that issue of bonds. They do not deny that the

QUESTION PRESENTED BY APPEAL.

property must in the end be sold under the mortgages; and, while insisting that Rawle can only enforce his lien to the extent of the past-due interest on that issue of bonds, there is no offer to provide means for the payment of that interest, and there is no pretence that the part of the property covered by his mortgage, whatever it may be, can be sold to advantage otherwise than as an entirety. Neither is it claimed that the property covered by the Devereux mortgage alone can be sold separate from the rest as advantageously as if the whole road and its branches were offered together. The entire opposition to a sale now rests on the claim that it is necessary, in order to protect the rights of these intervenors as lien creditors, that all disputed questions should be settled, or "bidding will be deterred on account of the risk and uncertainty, and the property will be in great danger of being sacrificed."

Against this is the fact that both the trustees agree in the opinion that the interests of their respective beneficiaries will be best subserved by an immediate sale, in which the creditors generally concur. In addition to this, the court finds, and the evidence shows, that the financial condition of the company under the administration of the receiver is continually growing worse. The receiver's certificates have increased since March 15, 1884, when the first loan was authorized, from \$100,000 to nearly \$156,000 in October, 1886, and the receiver in his answers says that from his knowledge "of the condition of said railroad company, and its property and finances, he verily believes it would be for the best interests of all parties concerned, including the stockholders, bondholders, and creditors, . . . that all its property should be sold as soon as possible, and in such manner as to give the purchasers thereof an unincumbered title thereto." This also was the opinion of the court when Rawle made his application, in the suit of Young & Tyler, for leave to sell, and which was then denied because the trustee of the Devereux mortgage did not unite in the application, and the court was satisfied that a fragmentary sale would operate injuriously upon the rights of all who were interested in securing the largest price for the property to be sold.

Against all this we do not find a word of evidence in the record, so that the only question is whether the law requires that a sale should be postponed, against the wishes of the mortgage trustees and a large majority of the bondholders, simply because these intervenors, representing a minority interest, object. As a rule, the trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust to which they are not actually parties. There is here no evidence to show fraud or unfairness on the part of the trustees. The company is satisfied with what they are doing, and so are all the bondholders under the Rawle mortgage, and a

TRUSTEE GOV.
ERNED BY CHOICE
OF MAJORITY OF
BONDHOLDERS.

majority of those under that to Devereux. As was said in *Shaw v. Railroad Co.*, 100 U. S. 612: "Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust." Here the majority want an immediate sale. In this the trustees both agree, as does the railroad company itself. There is no evidence whatever of a want of good faith in any one. The court below, having the practical workings of the receivership under its own eye, did not hesitate to say that "it is now entirely clear that the best interests of all parties concerned will be promoted by a speedy sale," and we see nothing to the contrary.

Of the power of the court to make such an order in a proper case we have no doubt. The property is in the possession of the court, and is depreciating in value by the accumulation of receiver's indebtedness, while the litigation between the parties as to their respective interests in it is going on. There cannot be a doubt that the whole ought to be sold together. If, in the end, it shall be found that the Rawle mortgage covers only a part, it will be as easy to fix the rule for dividing the proceeds equitably between the two securities after a sale as before, and there is nothing in the decree as entered to interfere in any way with such a distribution.

POWER
OF
COURT TO MAKE
THE ORDER.

Upon the facts as presented to us we are entirely satisfied that the decree of the court below was right, and it is consequently affirmed.

When Sale of Mortgaged Property in Foreclosure Proceedings will be Ordered.—See *Benedict v. St. Joe, etc., R. Co.*, 14 Am. & Eng. R. R. Cas. 609; *Hand v. Savannah, etc., R. Co.*, 12 Ib. 488.

Minority Bondholders—Rights of, against Majority.—*Gates v. Boston, etc., R. Co.*, 24 Am. & Eng. R. R. Cas. 148.

30 A. & E. R. Cas.—29

CENTRAL TRUST CO. OF NEW YORK

v.

EAST TENNESSEE, VIRGINIA AND GEORGIA R. CO. *et al.*

In re Intervening Petition of MILLER.

(*Advance Case, U. S. Circuit Court, N. D. Georgia. December 31, 1886.*)

The petitioner was a creditor of the defendant railroad company, having a judgment for personal injuries against it, growing out of torts committed by it before it was placed in the hands of a receiver. A suit was commenced to foreclose a mortgage upon the railway, extending through several States. The original bill was filed in Tennessee, and ancillary bills in Georgia, Alabama, and Mississippi. The petition was filed in the ancillary court in Georgia, to have an order against the receiver to pay his claim out of the earnings of the mortgagor that were on hand at the appointment of the receiver. *Held:*

1. That the court of Tennessee, in which the original bill was filed, and upon whose orders the receiver had paid out all the funds coming into his hands, was the proper tribunal to which the creditor should have applied.

2. That the petitioner was a general creditor, and his judgment was not entitled to priority of satisfaction out of the earnings of the receivership, and *a fortiori* not out of the *corpus* of the estate.

In equity.

R. B. Trippe and McCarny & Walker for petitioner.

Bacon & Rutherford, P. Q. Mynatt and W. M. Baxter, contra.

PARDEE, J.—The petitioner's claim is based on a certain judgment rendered in his favor against the defendant company in the superior court of Whitfield county, Georgia, on the thirteenth day of October, 1884, based upon personal injuries to petitioner's son, inflicted by the negligence of defendant's agents in the month of November, 1881. The intervention was filed in this court, April 26, 1886, praying for leave to file the claim in this cause, to be paid out of the proceeds of the sale of said defendant's property ordered heretofore to be sold, as appears by the records referring to the ancillary decree of foreclosure rendered in the court, March 27, 1886. On this intervention, this court (McKAY, J., presiding) made the following order: "The foregoing petition read and considered, and it is thereupon ordered that the prayer of petitioner be granted."

Some contention has been had as to the force and effect of this order, but it seems clear that it was intended as an order to permit the filing and hearing of the claim, and not as an ab-

absolute *ex parte* order that the claim should be paid. The proceedings in this cause have been from the first ancillary to the main suit for the foreclosure of a mortgage on a railway line extending into the States of Virginia, Tennessee, Georgia, Alabama, and Mississippi, instituted and carried on in the United States circuit court for the eastern district of Tennessee, at Knoxville, Tennessee. The court having control of the main suit has, of course, direct control of the receiver appointed in the case, of all moneys coming to his hands, of the distribution of the same, and of the distribution of all funds derived from the sale of property sold under decrees in the cause.

PETITION
SHOULD HAVE
BEEN FILED WITH
COURT HAVING
CONTROL OF
MAIN SUIT.

It follows that if any account is to be taken of the funds that came to the receiver's hands, and of the earnings of the railway property while in the receiver's hands, and of the disposition made of all funds, in order to determine the existence of a priority of any lien, such account should be taken in the main cause, and cannot be taken in any ancillary suit, where the court has no possession of the fund. For instance, on this hearing, it is admitted that \$75,000 came into the hands of the receiver on his taking possession of the railway property, and that the same were earnings of the property prior to the receivership. This fund was confessedly subject to the liens for labor and supplies by which it was earned, and has been largely, if not entirely, so applied by the court in the main cause. Now, if any one has a lien on such fund, or on the property of the company by reason of such fund, say for a judgment recovered against the company prior to the receivership, an accounting and marshalling of liens must be had, and such accounting and marshalling can only be had in one court, or inextricable confusion would result. So far, therefore, as petitioner's right to be paid depends upon any equity resulting from the receivership, or the management and disbursement of funds coming to the hands of the receiver, we can give him no relief, and can only refer him to the consideration of the circuit court at Knoxville.

WHAT CLAIMS
ARE CHARGES
UPON THE PROP-
ERTY OF THE
COMPANY.

In the original decree of foreclosure, rendered in the main suit, it was ordered as follows:

"And the purchasers of said property at said sale shall, as a part of the consideration of the purchase, and in addition to the sum bid, take the said property upon the express condition that he or they will pay off, satisfy, and discharge any and all claims now pending and undetermined in either of said courts accruing prior to the appointment of the receiver therein, or during the receivership, which may be allowed or adjudged by this court, as prior in right to said respective mortgages."

In the decree of March 27, 1886, in this court, ratifying and adopting the decree of foreclosure rendered in the main suit, it was, among other things, decreed as follows:

"That the aforesaid decree, and this decree, shall be so construed as that all claims and interventions now pending in this cause in this court, and heretofore or hereafter declared by this court to be liens on said property prior in right to the said mortgages, and all costs allowed by this court, shall be paid by said purchasers, in addition to all other sums in said original decree specified."

In the decree confirming the sale in the main suit, and adopted in this court, July 30, 1886, it is provided—

"That the purchasers shall take the said property, and that it be recited in the deed that they do take the property, subject to, and that the said purchasers assume and pay off any and all debts, claims, and demands, of whatsoever nature, now pending and undetermined in either of said courts, in which original and ancillary bills in this cause are pending, which must be allowed or adjudged by this court, or either of said courts, where ancillary bills are pending, as prior to any right secured under the said consolidated first mortgage."

From these recitals it clearly appears what claims and demands pending in this cause in this court are charges upon the property sold, and are assumed by the purchasers at the foreclosure sale, to wit, those claims and demands, pending herein, that this court shall adjudge are prior in right to the claims of the mortgage creditors.

There is authority for holding—in fact, it is practically decreed by the supreme court of the United States—that debts contracted by a railroad corporation as a part of the necessary operating expense for labor and supplies, or for necessary equipment or improvement of the mortgaged property, are privileged debts, entitled to be paid out of current income, if the mortgage trustees take possession, or if a receiver is appointed in a foreclosure suit. *Fosdick v. Schall*, 99 U. S. 225; *Burnham v. Bowen*, 111 U. S. 776; s. c., 17 Am. & Eng. R. R. Cas. 308. And if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable, in equity, with the restoration of the fund which has thus been improperly applied to their use.

General creditors of a railroad corporation, which includes those claiming damages for negligence in operating the railway, have never been held as having any privilege on the income of the property, much less on the *corpus* of the property; but there are many cases to the effect that no such privilege or equity exists. *Davenport v. Receivers*, 2 Woods, 519; *In re Dexterville Manuf'g Co. v. Receiver*, 4 Fed. Rep. 873; *Hiles v. Receiver*, 14 Fed. Rep. 141; *Hervey v. Illinois Midland R. Co.*, 28 Fed. Rep. 169; *Olyphant v. St. Louis Ore & Steel Co.*, Id. 729; *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, Id. 871.

The petitioner's claim against the railroad company is for personal injuries growing out of the negligence of the company's agents more than four years prior to the suit for foreclosure. Neither on principle nor authority can we adjudge such a claim to be prior in right to the mortgage bondholders. Whether or not there may be cases growing out of the circumstances attendant upon the creating of the mortgage, such as the notorious bonding of the property for sums largely in excess of its cost value, in which the mortgagors operating the road ought in equity and good conscience to be held as the mere agent of the mortgage bondholders, it is not necessary to decide in this case.

NEUMAN, J.—Having sat with Judge Pardee on the hearing of this case, I concur both in the reasoning and the conclusions of the foregoing opinion.

Relative Priority of Railroad Mortgagees and of General Creditors as to Funds in Hands of Receiver.—See Addison *et al.* v. Lewis *et al.*, and note, 9 Am. & Eng. R. R. Cas. 702, 718, where rules are stated at length.

BARNES

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. Co.

(122 U. S. Supreme Court Reports, 1.)

If a decree in equity be broader than is required by the pleadings, it will be so construed as to make its effect only such as is needed for the purpose of the case made by the pleadings, and of the issues which the decree decides.

The decree entered in accordance with the opinion of this court in *James v. Railroad Co.*, 6 Wall. 752, when properly construed, invalidated the foreclosure of the mortgage made by the La Crosse & Milwaukee R. Co. to the plaintiff in error only as to the creditors of the company subsequent to the mortgage who assailed it in that suit, but did not affect it as to the rights of the plaintiff in error or of the bondholders secured by the mortgage, which were acquired under that foreclosure.

The consent of bondholders required by the statute of Wisconsin to enable the plaintiff in error to commence proceedings for the foreclosure of the mortgage of the La Crosse & Milwaukee R. was duly given; and the outstanding bonds which were not actually surrendered and exchanged for stock were held by persons who, in law, must be regarded as consenting by silence to the proceedings, and the present holders took them with full notice of that fact.

The plaintiff in error has no title under which he can maintain a bill in equity to take advantage of alleged frauds or irregularities in the foreclosure of prior liens upon the La Crosse & Milwaukee R., or to recover

money paid by the Milwaukee & Minnesota R. Co. to redeem the Bronson and Soutter mortgage of that railroad.

APPEAL from the Circuit Court of the United States for the Northern District of Wisconsin.

In equity. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion of the court.

Francis Fellowes and *William Barnes* for appellant.

John W. Cary for appellee.

WAITE, J.—This is a suit by William Barnes to foreclose a mortgage made to him, as trustee, by the La Crosse & Milwaukee R. Co., hereinafter designated as the La Crosse Co. The record
FACTS. shows that this company was incorporated by the legislature of Wisconsin on the 11th of April, 1852, to build and operate a railroad in that State between La Crosse, on the Mississippi River, and Milwaukee, on Lake Michigan, a distance of about two hundred miles. The road was originally regarded by the company and treated as consisting of two divisions—one, called the Eastern Division, extending from Milwaukee to Portage City, a distance of 95 miles; and the other, called the Western Division, extending from La Crosse to Portage City, a distance of 105 miles.

The Eastern Division was incumbered by three mortgages, as follows: 1, the Palmer mortgage, so called, to secure an issue of bonds to the amount of \$922,000; 2, a mortgage to Greene C. Bronson and James T. Sontter, to secure bonds to the amount of \$1,000,000; and, 3, a mortgage to the city of Milwaukee, to secure about \$314,000. The Western Division was likewise incumbered: 1, by a mortgage to Greene C. Bronson, James T. Sontter, and Shephard F. Knapp, known as the land-grant mortgage, to secure bonds to the amount of \$4,000,000; and, 2, by a mortgage to Albert Helfenstein, to secure bonds for \$200,000.

Judgments had also been rendered against the company prior to June 21, 1858, as follows:

1. One in favor of Selah Chamberlain, in the Circuit Court of the United States for the District of Wisconsin, on the 2d of October, 1857, for \$629,089.72;
2. Another in the same court on the 7th of October, 1857, in favor of Newcomb Cleveland for \$111,727.31;
3. Another in the Circuit Court of Milwaukee County, in the spring of 1858, in favor of Sebra Howard for \$25,000;
- and, 4. Another in the last-named court in favor of the Mercantile Bank of Hartford, Conn., on the 12th of June, 1858, for \$25,000.

On the 1st of June, 1858, the company, being embarrassed by a large floating debt, and by its obligations to persons who had mortgaged their farms to aid in building its road, determined to issue other bonds to the amount of \$2,000,000, and secure them by

another mortgage on its entire line of road between La Crosse and Milwaukee, subject to the prior mortgage incumbrances. Accordingly the mortgage now in suit was executed to William Barnes, trustee, on the 21st of June, 1858, to secure such an issue. It covered "all the property, real and personal, of said railroad company to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges, and franchises of said railroad company in respect to said railroad from Milwaukee to La Crosse, except its land grant, but subject to all the prior mortgages above referred to." Afterwards, on the 11th of August, 1858, a mortgage supplemental to this was executed by way of further assurance. The mortgages thus executed contained a provision that if there should be default in the payment of interest for the space of fifteen days, the principal should become due, and the trustee, on the request of the holders of bonds to the amount of \$100,000, should advertise and sell the mortgaged property.

Afterward the following judgments were recovered against the company, namely: 1. One in favor of Edwin C. Litchfield, in the District Court of the United States for the District of Wisconsin, October 5, 1858, for \$26,353.51; 2. Another in the same court, April 5, 1859, in favor of Nathaniel S. Bouton for \$7,937.37; 3. Another in favor of Philip S. Justice and others, in the Circuit Court of the county of Milwaukee, for \$2,035.33; and 4. Another in the last-named court, in favor of E. Bradford Greenleaf, September 10, 1858, for \$840.86.

At the time when the mortgage to Barnes was executed, the Revised Statutes of Wisconsin, § 33, c. 79, provided that, in case of any sale of a railroad "on or by virtue of any trust deed, or on any foreclosure of any mortgage thereupon, the party or parties acquiring the title under any such sale and their associates, successors, [and] assigns, shall have and acquire thereby, and shall exercise and enjoy thereafter all and the same rights, privileges, grants, franchises, immunities, and advantages in and by said mortgage or trust deed enumerated and conveyed which belonged to and were enjoyed by the company," so far as they relate to the property bought, in all respects the same as "such company might or could have done therefor had no such sale or purchase taken place; such purchaser or purchasers, their associates, successors, or assignors [assignees], may proceed to organize anew and elect directors, distribute and dispose of stock, take the same or another name, and may conduct their business generally under and in the manner provided in the charter of such railroad company, with such variations in manner and form of organization as their altered circumstances and better convenience may seem to require."

Afterward, on the 8th of February, 1859, an act supplementary to c. 79 of the Revised Statutes was passed, by which it was pro-

vided that in case of any sale of a railroad in the State under a deed of trust, or on a foreclosure, if no one bid an amount equal to seventy-five per cent of the mortgage debt, the trustee might bid that amount or more, in his discretion, to the full amount of the debt and interest due, if competition should make it necessary; and that the estate so acquired by the trustee should "be held in trust for the holders of such outstanding bonds or obligations in the same manner as if they had become the purchasers, in proportion to the amount of such bonds or obligations severally held by them." Laws of Wisconsin, 1859, c. 10, p. 13.

On the 11th of the same month of February holders of the bonds secured by the mortgage in favor of Barnes, to the amount of more than one hundred thousand dollars, presented to him their request in writing that he proceed to sell under his trust, and that he purchase the property at the sale for the bondholders at the price of seventy-five per cent of the outstanding bonds and past-due interest, and more if necessary, not exceeding the full amount of the debt, principal, and interest. Accordingly he advertised the property for sale pursuant to the provisions of his mortgage, and on the 21st of May, 1859, bought it under the authority of the act of February 8, 1859, and the request which had been made, at the price of \$1,593,333.33, for the benefit of the bondholders. Two days afterward he united with certain persons representing themselves to be the owners of bonds to the amount of \$1,302,850 in the organization of the Milwaukee & Minnesota company, hereafter called the Minnesota company, under § 33, c. 79, of the Revised Statutes, to own and operate the railroad, and by the same instrument he transferred his purchase to the company. The capital stock was fixed at \$2,500,000, and the articles of organization contained the following provisions in reference thereto:

"Article IV. The stockholders of the said Milwaukee & Minnesota R. Co. are the holders of the said bonds, secured by the said mortgages or trust deeds, for whose benefit the said sale and purchase was made by the said William Barnes, and such other persons as shall hereafter associate themselves with them by subscription to the said capital stock or other proper means.

"Each holder of the said bonds, upon surrendering his bonds to the proper officer of the said Milwaukee & Minnesota R. Co., shall be entitled to receive a certificate of stock in the company hereby organized of an equal amount with the principal of the bonds so surrendered by him, subject, nevertheless, to the payment in money of the *pro rata* share of the costs, charges, and expenses of the said sale and of the organization, and of carrying the same into effect, being the proportion of the whole of such costs, charges, and expenses as the amount of stock so to be issued shall bear to two millions of dollars.

"Article V. The payment of the said *pro rata* share of such

costs, charges, and expenses is hereby declared to be a charge and lien upon the stock to which each holder of the said bonds is entitled. And the board of directors of the said Milwaukee & Minnesota R. Co. shall have power to declare the right to such stock forfeited by the non-payment of such *pro rata* share of such costs, charges, and expenses in such manner as the said board of directors shall determine."

On the 5th of December, 1859, a bill was filed in the district court of the United States for the district of Wisconsin, by Bronson and others, trustees, against the La Crosse company, the Minnesota company, Helfenstein, trustee, and Cleveland and Chamberlain, judgment creditors, to foreclose the land-grant mortgage on the Western Division, and on the 9th of the same month a like bill was filed in the same court against the same parties by Bronson and Soutter, trustees, to foreclose the mortgage to them on the Eastern Division. Under the bill for the foreclosure of the land-grant mortgage the Western Division was sold April 25, 1863, to purchasers who organized themselves, pursuant to § 33, c. 79 of the Revised Statutes, into a corporation by the name of the Milwaukee & St. Paul Railway Company, to which the property so purchased was duly conveyed. This company will be hereafter referred to as the St. Paul company.

In the suit for the foreclosure of the mortgage on the Eastern Division such proceedings were had that a receiver was appointed, who took possession of the mortgaged property, under an order of the court, and caused it to be operated by the St. Paul company, in connection with the Western Division. Afterward, on the 18th of July, 1865, it was adjudged in this suit that the Minnesota company, upon the payment of the amount ascertained to be due on the Bronson and Soutter mortgage for interest, be permitted to redeem and take possession of the Eastern Division and the rolling stock which belonged to it. On the 28th of September, 1865, a decree was entered finding due upon the mortgage \$1,000,000 of principal and \$454,937.39 of interest, and ordering a sale of the mortgaged property for its payment, but saving the right of the Minnesota company to redeem in the manner specified in the order of July 18. On the 3d of January, 1866, this company paid into the registry of the court the amount of money required to make the redemption. Thereupon all further proceedings under this suit for foreclosure were stopped, and on the 20th of January, 1866, the Eastern Division and its rolling stock were handed over by the receiver to the possession of the Minnesota company.

On the 18th of April, 1866, Frederick P. James, claiming to be the assignee of the judgment against the La Crosse company in favor of Newcomb Cleveland for \$111,727.71, which had been recovered prior to the execution of the mortgage to Barnes, commenced a suit in equity in the circuit court of the United States

for the district of Wisconsin against the Minnesota company, to enforce the lien of that judgment on the Eastern Division, as being superior to the title acquired by the company through the sale under the Barnes mortgage. Such proceedings were had in this suit that, on the 11th of January, 1867, a decree was entered finding due to James on this judgment \$98,801.51, and ordering a sale of the Eastern Division for its payment, subject, however, to the liens of the mortgages prior to that of Barnes and to the lien of the Chamberlain judgment. Under this decree the property was sold and conveyed to the St. Paul company, March 2, 1867, for \$100,920.94, and from that time that company has been in possession, claiming title adversely to the Minnesota company and to the Barnes mortgage.

On the 20th of April, 1863, while the suit for the foreclosure of the Bronson and Soutter mortgage was pending, and a few days before the sale of the Western Division under the foreclosure of the land-grant mortgage, Frederick P. James and Abram M. Brewer, claiming to be the assignees of the judgments in favor of Edwin C. Litchfield and Nathaniel S. Bouton against the La Crosse company, which had been recovered after the execution of the Barnes mortgage, and Philip S. Justice and others, and E. Bradford Greenleaf, also judgment creditors, brought suit in the circuit court of the United States against the La Crosse company, the Minnesota company, and Selah Chamberlain, to set aside the mortgage to Barnes and his foreclosure thereunder and to have the property sold free of that incumbrance for the payment of their judgments. In that suit a decree was rendered July 9, 1868, in accordance with the prayer of the bill, save only that the mortgage was adjudged to be valid to the extent of the bonds that had been actually negotiated by the company to *bona fide* holders. No further proceedings have been had in that suit, and no attempt has ever been made to carry the decree into execution.

Such being the conceded facts, Barnes, as trustee, brought this suit in the circuit court of the United States for the eastern district of Wisconsin, on the 6th of June, 1878, against the St. Paul company, which had changed its name to that of the Chicago, Milwaukee & St. Paul Railway Company, the La Crosse company, and the Minnesota company, for the foreclosure of his mortgage. In his bill he alleges, as to the first foreclosure, 1, that it had been actually adjudged, in the suit of James and others, to have been fraudulent, and null and void, and that the St. Paul company is estopped from asserting to the contrary, because that suit was brought by its procurement, and was in fact prosecuted by it and in its behalf, although in the names of James and his associates; and, 2, because the bondholders insist that the deeds of trust, "and the powers in trust conferred

BARNES' FORE-
CLOSURE SUIT—
ALLEGATIONS IN
BILL.

thereby, remain unimpaired and as they were before said proceedings for sale were had, . . . because they say :

“1. The said estate was a trust, and a trust can never be terminated without the consent of the *cestuis que trust* except by its due execution.

“2. Because the powers of sale granted by said deeds to your orator are powers in trust, and, not having been executed in conformity with the requirements of the deeds by which they were granted, remain unexecuted.

“3. Because the said act, c. 79, being repugnant to the Constitution of the United States, no proper and legal execution of said powers could be made under its authority.

“4. Because the terms and conditions prescribed by the act were not complied with, and, therefore, even if the act were valid, the said powers still remain powers in trust unexecuted ;” and it was insisted “that no number of bondholders less than the whole number entitled to the estate granted to your orator by said deeds of trust as security could, under § 33 of the statute laws of Wisconsin aforesaid, legally organize a corporation and vest in it the title to said estate, and so deprive bondholders not consenting thereto of their security, and that, inasmuch as bondholders to a large amount did not consent to the said sale and organization, the same were null and void.”

As to the proceedings in the suits for the foreclosure of the land-grant mortgage, and for the enforcement of the lien of the Cleveland judgment under which the St. Paul company acquired title, the material averment, in the view we take of the case, is, that “the said Minnesota company, so called, had no title to said estate, called the third mortgage, conveyed to him (Barnes) by said deeds of trust, which could be barred by said decree of foreclosure, of said land-grant mortgage, or by said decree of foreclosure in the name of said James, upon the said Cleveland judgment, and that your orator retaining his title to said estate, and not being a party to said foreclosure sales, the said estate has ever remained, and now remains, in him, for the benefit of said *cestuis que trust*, said decrees and said pretences of the said defendants notwithstanding.”

To this bill the St. Paul company filed a plea, setting up the original foreclosure, “with the knowledge, consent, and approval, and at the request of the bondholders ;” the purchase at the sale by Barnes in trust for the bondholders, in accordance with the provisions of the act of February 8, 1859 ; the organization of the Minnesota company for the purposes and with the powers above stated ; and the transfer of the property thereto. The plea then proceeds as follows :

“That thereupon said bondholders surrendered their said bonds to said corporation to be cancelled, and the same were so cancelled,

PLEA FILED BY
ST. PAUL COM-
PANY.

and the said corporation thereupon issued to said several bondholders in exchange for their said bonds the corporate stock of said Milwaukee & Minnesota R. Co. to an amount equal to the principal of said bonds so surrendered in pursuance of said articles of organization, and which said stock was so received by said bondholders in full satisfaction and payment of their said bonds, and that all of the bonds issued by said La Crosse & Milwaukee R. Co. under said mortgages or trust deeds were then, at the organization of said Milwaukee & Minnesota R. Co., or subsequently thereto, so surrendered to said corporation to be cancelled, and were cancelled, and stock of said company issued therefor.

"That by the proceedings aforesaid the said mortgages or trust deeds so as aforesaid given to said William Barnes were foreclosed, and the right of redemption theretofore existing in the said La Crosse & Milwaukee R. Co. to redeem said property from the lien of said mortgages or trust deeds was thereby barred and foreclosed, and the said mortgage interest, so as aforesaid conveyed by said mortgages or trust deeds to said William Barnes, became an absolute estate in fee simple to all of the property covered by said mortgages or trust deeds in the said Milwaukee & Minnesota R. Co., subject to the prior liens thereon, and that thereby the trust relation to said property created by said mortgages or trust deeds between the said William Barnes and the holders of the bonds issued under said mortgages or trust deeds ended, and that no trust relation in respect to said property now exists, or has existed, since the filing of said articles of organization between said William Barnes and said bondholders."

It is then alleged that the Minnesota company was made a party to the several suits under which the St. Paul company claims title; that it appeared therein and "was recognized and treated as the owner of the equity of redemption of said property by virtue of the aforesaid proceedings;" and that, "by means of the proceedings aforesaid, the said William Barnes ceased to have any right, title, or interest as trustee as aforesaid in, to, or upon or under the said alleged mortgages or trust deeds, and his said bondholders ceased to have any right, title, or interest in, to, or upon the premises described therein and purporting to be affected thereby, and at the time of filing said bill of complaint the said William Barnes had no right, title, estate, lien, claim, demand, or equity of redemption, as trustee or otherwise, of, in, to, or upon the premises described in the said mortgages or trust deeds."

This plea was set down for argument and sustained by the court, whereupon a replication was filed and proofs taken. After hearing, an interlocutory decree was entered April 21, 1882, finding that \$1,010,400 of the bonds had been actually exchanged for stock in the Minnesota company; that \$693,000 had either been cancelled by the company before their issue, or had

FINDINGS OF
INTERLOCUTORY
DECREE.

been surrendered by their owners for cancellation, and had actually been cancelled, after being issued ; and that \$37,400, belonging to the St. Paul company, were then in court, and for which no claim was made under the trust. The total amount thus accounted for was \$1,740,880, and as to these it was adjudged that they constituted no valid claim against the La Crosse company under the mortgage, and that so far as they were concerned the plea of the St. Paul company was sustained, and Barnes was entitled to no relief. As to the remaining \$259,200 of bonds provided for in the mortgage, a reference was made to a master to inquire what, if any, were justly due and in equity entitled to payment out of the mortgage security. Under this reference the master took testimony and reported in favor of the following persons and for the following amounts :

1. Matthew H. Robinson, one bond, \$100, on which was due for principal and interest.....	\$417 55
2. Frederick Van Wyck, assignee of of William H. Sisson, 2 bonds, \$1,000, on which was due for principal and interest.....	4,175 50
3. A. S. Bright and A. C. Gunnison, 22 bonds, \$10,900, on which was due for principal and interest.....	45,512 95
4. Andrew J. Riker, 8 bonds, \$800, on which was due for principal and interest.....	3,840 40
5. August F. Suelflohn, 4 bonds, \$800, on which was due for principal and interest.....	3,840 40
6. M. M. Comstock, 2 bonds, \$200, on which was due for principal and interest.....	885 10
7. Mary Christie Emmons, 2 bonds, \$200, on which was due for principal and interest.....	885 10
8. Reid & Smith, 19 bonds, \$6,400, on which was due for principal and interest.....	26,723 20
9. J. H. Tesch, 11 bonds, \$1,100, on which was due for principal and interest.....	4,593 05
In all, bonds \$21,500—due.....	\$89,773 85

To this report exceptions were filed, which the court, after hearing, “being of opinion that said claims do not constitute under the mortgages . . . a valid lien upon the property,” sustained and dismissed the bill. From a decree to that effect this appeal was taken.

The ultimate question for determination is whether Barnes, the trustee, and the bondholders secured by the mortgage to him, are bound by the decrees in the suits for the enforcement of the prior liens, namely, the land-grant mortgage and the Cleveland judgment, to which the Minnesota company was a party. That depends on the legal effect of what was done by Barnes in 1859, for the purpose of foreclosing his mortgage and organizing the Minnesota company to take the property, under his purchase at that sale, in trust for the bondholders. It is now alleged that this was all null and void: 1, because it has been so adjudged in the suit brought by James and

MASTER'S REPORT.

QUESTION FOR DETERMINATION—FORECLOSURE OF BARNES' MORTGAGE.

others; and, 2, because the act of February 8, 1859, under which Barnes acted in buying at his own sale and in organizing the company, was unconstitutional in its application to his mortgage, which was executed before its passage, and the bonds secured thereby. The claim is, that a purchase by Barnes himself at his own sale, without the payment of his bid in money, could not operate as a foreclosure of the mortgage, except with the consent of all the bondholders, which was never given.

The sufficiency of the first of these objections is to be determined by the averments in the bill, taken in connection with the exhibits to which they relate. As to the second, the St. Paul company pleads in substance that Barnes, in foreclosing his mortgage and in organizing the Minnesota company after his purchase, acted "with the knowledge, consent, and approval, and at the request of the bondholders."

1. As to the decree in the suit of James and others. The copy of the bill in that suit, which is one of the exhibits in this case, JAMES' SUIT—
ALLEGATIONS IN
THE BILL. shows that it was filed by certain judgment creditors of the La Crosse company to collect their judgments. It is a creditors' bill, pure and simple, brought by James and his associates, "on their own behalf, and in behalf of all the creditors of the La Crosse & Milwaukee R. Co., who have or claim a lien upon the railroad of said company," and "who shall come in and seek relief by and contribute to the expenses of this suit," to obtain a sale of "all of the property, real and personal, franchises and privileges of the La Crosse & Milwaukee R. Co., or which was theirs at the time of said sale by Barnes, May 21, 1859," "subject to the prior claims" described in the mortgage to Barnes, "and that the proceeds of said sale be brought into court, to be divided according to the legal priorities of your orators and the other claimants thereto." It alleges, in substance, that the mortgage to Barnes was executed "for the purpose and with the design of bringing about a speedy sale of said road and its franchises, and cutting off the stockholders in said company, and to hinder, delay, and defraud the creditors of the said La Crosse . . . company, and passing the property in or to the road and its franchises to some of the directors of said company and their friends." The La Crosse company, although nominally a party to the suit, did not appear, and did not ask relief, and there is no pretence that the complainants either did or could prosecute the suit in behalf of the stockholders. If, as is alleged, the St. Paul company was the promoter as well as the real prosecutor of the suit, it is bound only to the extent it would be if it had been actually the complainant. The most that can be claimed in this behalf is, that it stands in the place of the complainants named in the bill, and is bound as they are bound; no more, no less.

SAME—POSITION
OF ST. PAUL CO.
—EXTENT TO
WHICH IT IS
BOUND.

The decree—which, with the opinion of Mr. Justice Nelson, announcing the judgment of this court in *James v. Railroad Co.*, 6 Wall. 752, is one of the exhibits in this SAME—THE DE-
CREE. case—adjudges that the mortgage to Barnes was good and valid “as a security for the bonds issued under it in the hands of *bona fide* holders for value, without notice,” which, it was found, did not exceed \$200,000; that the foreclosure and sale be “set aside, vacated, and annulled,” and the Minnesota company be “perpetually restrained and enjoined from setting up any right or title under it,” because it was made in pursuance of a notice claiming that \$2,000,000 of bonds had been issued, and there was default in the payment of \$70,000 of interest when less than \$200,000 had ever been negotiated to *bona fide* holders, and the foreclosure proceeding was in other respects irregular and fraudulent; and that all the right, title, interest, and claim which the La Crosse company had in the railroad from Milwaukee to Portage City be sold to pay the judgments in favor of the complainants, “unless prior to such sale the defendants pay to said complainants” the amounts due thereon.

Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so EFFECT OF DE-
CREE BROADER
THAN REQUIRED. that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided. *Graham v. Railroad Co.*, 3 Wall. 704. Here the suit was by and for creditors to set aside the mortgage to Barnes and the foreclosure thereunder, because made and had to hinder and delay them in the collection of their debts. The decree, therefore, although broader in its terms, must be held to mean no more than that the foreclosure was void as to these creditors, whose claims were inferior in right to that of the mortgage, and that the Minnesota company was restrained and enjoined from asserting title as against them; and also that, if they undertook to sell the property to pay their judgments, the mortgage to Barnes should stand only as security for such bonds as had been actually negotiated by the La Crosse company to *bona fide* holders.

Such also was the judgment of this court in *Railroad Co. v. Soutter*, 13 Wall. 517, which was a suit brought by the Minnesota company, June 4, 1869, to recover back the money it had paid to redeem the mortgage to Bronson & RAILROAD CO. V.
SOUTTER EX-
AMINED. Soutter on the Eastern Division, for the reason that the foreclosure of the mortgage to Barnes was fraudulent, and it had been so adjudged in the James suit. In announcing the opinion of the court, Mr. Justice Bradley said, p. 523: “Who are the complainants? Are they not the very bondholders, self-incorporated into a body politic, who, through their trustee and agent, affected a sale which was declared fraudulent and void as against

creditors, and made the purchase which has been set aside for that cause? . . . But the complainants are wrong in asserting that the property was not theirs. It was theirs. Their purchase was declared void only as against the creditors of the La Crosse & Milwaukee R. Co. In other words, it was only voidable, not absolutely void. By satisfying these creditors they could have kept the property, and their title would have been good, as against all the world. The property was theirs; but, by reason of the fraudulent sale, was subject to the incumbrance of the debts of the La Crosse company. This was the legal effect of the decree declaring their title void. Therefore, they were, in fact, paying off an incumbrance on their property when they paid into court the money which they are now seeking to recover back."

This being the extent of the legal effect of the James decree, it follows that, if the proceedings by Barnes in 1859 for the foreclosure of his mortgage were sufficient in form, the Minnesota company represented that mortgage, and the holders of the bonds secured thereby, in the suits to which it was a party brought to enforce the prior liens under which the St. Paul company claims title, and that both Barnes, the trustee, and the bondholders are bound by the decrees therein. The La Crosse company has never disputed the title of the Minnesota company, and the prior lienholders recognized it as good when they proceeded against the company to enforce their respective rights. The property has been lost, not because the foreclosure was invalid, but because it was all needed to satisfy liens which were prior in right to that of the Barnes mortgage, under which alone the company claims title. When the creditors in the James suit undertake to carry their decree into execution it will be time enough to consider how far they are bound by the decrees in the suits for the enforcement of the prior liens which were all obtained and executed pending their litigation with the company. We are now dealing only with Barnes and the bondholders claiming under him.

2. As to the plea. The bill in effect concedes, as is necessarily true, that if all the bondholders consented to a foreclosure under the act of February 8, 1859, the purchase of the property by the trustee for their benefit, and the transfer of title by him to the Minnesota company as their representative, would be good, even though without such consent it might be bad. The plea alleges such a consent, and also an actual exchange of all the bonds for stock in the company. The material question thus presented is, whether the bondholders consented to what was done by the trustee in their behalf. If they did, it matters not that some have omitted to surrender their bonds for cancellation, and take certificates of stock in exchange. If they assented to what was done they became in law purchasers at the foreclosure sale, and, as such, stockholders in the company which was organized

LEGAL EFFECT
OF JAMES' DE-
CREE.

THE PLEA CON-
SIDERED.

under the statute in their behalf to take the property from their trustee, and that, too, without any formal surrender of their bonds. Their stock was bound for the payment in money of their respective *pro rata* shares of the costs, charges, and expenses of the sale, and of the organization of the company and of carrying the same into effect. If they wanted certificates of stock, they were required to surrender their bonds and pay what was due from them on this account, but as bondholders, purchasing through their trustee, they became by the express terms of the articles of organization stockholders in the new corporation, with a lien on their shares for their proportion of the expenses, etc. The averment in the plea of an actual surrender of bonds for cancellation, and an issue of stock in exchange therefor, presents an immaterial issue. The voluntary exchange of bonds for stock would show a positive assent to the foreclosure, but a failure to do so would not necessarily imply dissent.

The exact issue to be tried, therefore, is whether the necessary consent was actually given. The enabling statute was approved February 8, 1859, and on the 11th of the same month, only three days afterward, the requisite amount of bondholders presented their request to Barnes that he proceed to foreclose the mortgage and buy the property for the bondholders under the authority thus conferred on him for that purpose. In accordance with this request, he advertised the sale, and made the purchase May 21, 1859. Two days afterward he organized the company, under the statute, to take the title from him as trustee for those in whose behalf he bought. From that time forward, during all the protracted litigation which ensued, this company claimed to own the property, subject only to the incumbrance of prior liens, and neither Barnes nor any bondholder, so far as this record discloses, ever asserted the contrary until after the James suit was decided, when the St. Paul company was in possession under its purchases upon decrees for the enforcement of the prior liens in suits to which the company was a party. During all this time the Minnesota company was active in asserting its title, and its litigation with the prior incumbrancers was constant and energetic, as the records of this court show in *Bronson v. La Crosse R. Co.*, 1 Wall. 405; s. c., 2 Wall. 283; *Milwaukee R. Co. v. Soutter*, 2 Wall. 440; s. c., 2 Wall. 510; *Graham v. Railroad Co.*, 3 Wall. 704; *Milwaukee R. Co. v. Soutter*, 5 Wall. 660; *Railroad Cos. v. Chamberlain*, 6 Wall. 748; *Railroad Co. v. James*, 6 Wall. 750; *Railroad Co. v. James et al.*, 6 Wall. 752.

The amount of bonds authorized by the mortgage was \$2,000,000. The proof is abundant that of this amount \$1,010,400 were actually converted into stock, and that \$730,400 had either been surrendered for cancellation because they had never been issued, or because the holders made no claim against the La Crosse company

on their account. The findings of the court below show the particulars as to the whole of these two amounts, and we are entirely satisfied with the correctness of the conclusions there reached. Some of the holders claim that they were persuaded against their own judgment, and, perhaps, against their will, to make the exchange, but still their bonds were actually surrendered and certificates of stock taken in exchange therefor. They kept silent during all the time the litigation with the Minnesota company was going on, and uttered no complaints until after the James suit was decided against their interest then represented by that company.

There remained, however, at the time of the rendition of the interlocutory decree below, \$259,200 of bonds unaccounted for, and a reference was made to a master to receive claims therefor, and to take testimony and report thereon. Under this reference bonds to the amount of \$21,500 were presented to and allowed by the master. None of these bonds had been actually surrendered to the company and exchanged for stock, but after a careful examination of the testimony we have no hesitation in deciding that, at the time of the foreclosure, they were held and owned by parties who in law consented thereto, and that the present holders took them with full notice of that fact.

Of the amount allowed by the master, Bright & Gunnison alone represent \$17,300, although Reid & Smith have a claim on \$6,400 thereof for money advanced. Both Bright and Gunnison were officers in the Minnesota company, and at times very active in the management of its affairs. Of the bonds which they represent \$7,500 were owned by William E. Cramer at the time of the foreclosure, and he signed the request to Barnes that he sell the property and buy it for the bondholders under the statute. These bonds were bought by Bright and Gunnison, or some person whom they represent, after this suit was begun, Cramer receiving for them \$900. The rest of the bonds which they present were undoubtedly owned by them while they were acting as officers of the company, and as such defending the suits for the enforcement of the prior liens, if not at the time of the original foreclosure by Barnes.

Suelflohn, who presents a claim for \$800, actually owned his bonds at the time of the foreclosure and signed the request that was presented to Barnes. Robertson, who claims \$100, was a clerk in the office of Barnes when the bonds were issued, during the foreclosure, and for many years afterward. He received his bond for services in connection with this business. Mary Christie Emmons claims \$200 for bonds she got from her father, one of the original organizers of the company, and named in the articles of organization as one of the directors, a position which he occupied for several years afterward. Maria M. Comstock's claim is for

bonds she got from her father, Leander Comstock, who held them at the time of the foreclosure, and who then did and ever since has resided in Milwaukee, and presumably had knowledge of what was being done. Frederick Van Wyck, who claims \$1000, is a son-in-law of Bright, and the bonds he presents were bought by him at the suggestion of his father-in-law from William H. Sisson for a small sum after they had been filed as a claim by Sisson himself. Sisson was a lawyer in Chicago, but whether he owned the bonds or held them for others does not appear. Andrew J. Riker, who claims \$800, was a broker in New York at the time of the foreclosure and before and after. He owned the bonds he now presents at that time and must have been familiar then with all that occurred, for he held land-grant bonds also, and says that after the foreclosure of that mortgage he laid them aside as of no value, because he "thought the thing was all closed up." John H. Tesch, who claims \$1100, held his bonds at the time of the foreclosure. He resided then and since in Milwaukee, and was familiar in a general way with all that was done. He knew of the Barnes foreclosure, though he says: "I did not know that my bonds had anything to do with it; I did not follow that up; it was a common report mentioned in the newspapers, but did not know it concerned me." But before that he had been informed by his counsel that they were good for nothing and would not be paid.

Under these circumstances, we cannot do otherwise than decide, that the silence of the holders of these few bonds, during all the time the Minnesota company was acting in their behalf, is equivalent to actual consent to the sale under which the company got the right to represent their interests in the litigation with the prior lien holders. They are the only persons, so far as the record discloses, who did not actually surrender their bonds and take certificates of stock therefor, and it is now too late for them to say that what their trustee did in their behalf was without authority. There cannot be a doubt that they knew of the foreclosure at or near the time it took place. If the purchase was not made for their benefit, under the act of 1879, the trustee was accountable to them in money for their proportion of what he bid for the property. For this they never applied, and it must, therefore, be assumed that he bought for their account, as well as that of the other bondholders, and that they assented thereto.

It follows that the plea has been sustained by the evidence, and this necessarily disposes of all the other questions in the case. The sale by Barnes to the company under the foreclosure divested him of title and of his right to bring suit in behalf of bondholders. The decree in the James suit did not dissolve the Minnesota company. It simply established the right of the judgment creditors who brought that suit to redeem the Barnes mortgage, by paying

the amount due for bonds that had been actually negotiated by the La Crosse company to *bona fide* holders, and to have the mortgaged property sold subject to such a lien. The company still continued in existence and still owned the property that had been bought, subject only to the inferior liens of the creditors whose rights had been established.

Neither can Barnes now take advantage of the alleged frauds or irregularities in the foreclosures of the prior liens. He not only has no title under which he could proceed for that purpose, but all such questions were settled and finally disposed of in the decrees to which the Minnesota company was a party.

So, also, of the claim which was made before the master to recover back the money paid to redeem the Bronson and Soutter mortgage. That money was paid by the Minnesota company, and that company alone can sue for its recovery. Such a suit was once brought and a decree rendered against the company.

The decree of the Circuit Court dismissing the bill was right, and it is consequently affirmed.

See note to Woods *v.* Pittsburgh, etc., R. Co., 7 Am. & Eng. R. R. Cas. 481.

WASHINGTON, OHIO AND WESTERN R. CO.

v.

LEWIS *et al.*

(*Advance Case, Virginia. April 28, 1887.*)

The county of Clarke, Virginia, voted a subscription to a railroad company, to which the appellant is the successor, payable upon the construction of the road through that county by 1892. The railroad company not having reached the county in the construction of its road, arranged with the county to receive the subscription in the bonds of the county, and executed a trust deed to secure its bond for the amount of the subscription, conditioned that the company should pay the interest on these bonds until the road should be constructed into that county, and to indemnify the county against the principal of the bonds, unless the road should be constructed by the time agreed. The company hypothecated some of the bonds. Afterward other incumbrances were placed upon the road, by the original company and its successor. Subsequently a creditors' bill was filed to sell the property of the road and subject it to the claims of its creditors. A sale was had subject to the lien of Clarke county, and a part of the proceeds were applied to the redemption of the hypothecated bonds, whereupon they came into the possession of the court. In determining to whom the redeemed bonds belong, the purchasers at the sale (the appellant company) or the creditors of the road, *held*, that the bonds having been redeemed by the money held in trust by the court for the benefit of creditors of the first cor-

poration, the new corporation could only receive them by paying back into the trust fund the amount by which it had been depleted for their benefit and profit.

APPEAL from circuit court, city of Richmond.

This suit was a general creditors' bill to sell the property of the Washington & Ohio R. Co., and to subject the same to the payment of its debts. Among the liens thus sought to be enforced was the mortgage of April 1, 1871, by which the Washington & Ohio R. Co. conveyed to certain trustees "all and singular the estate and property, real, personal, and mixed, and all and singular the railroads or railways of said company." The object of the suit was to foreclose the liens upon the property of the railroad company, to sell the same, and to subject it to the payment of its debts. There had been a sale, under the decree of April 23, 1880, to the Washington & Western R. Co., and default in payment. There was a resale under decree of February 16, 1883. At this resale the Washington, Ohio & Western R. Co. (appellants here) became the purchaser. By decree of May 23, 1883, the sale to appellants was confirmed, and the purchasers were declared to be entitled to "the rights, properties, and franchises of the Washington & Western R. Co., formerly the Washington & Ohio R. Co., . . . including . . . all the works and property, real and personal and mixed, and all rights, contracts, and franchises."

The pleadings, the decree, advertisement, confirmation, and deed show that one lien upon his property was not, and was not intended to be, enforced in these proceedings, but that the purchaser took, subject to the same, and assumed whatever burden was specifically imposed thereby upon the property which he purchased. That was the lien of the deed of trust executed August 6, 1858, to secure to the county of Clarke the obligations of a bond executed to that county by the railroad company in its then name of the Alexandria, Loudoun & Hampshire R. Co. This was the character, in brief, of that obligation, so far as it has any bearing upon this appeal. The county of Clarke had subscribed to \$100,000 of the capital stock of the Alexandria, Loudoun & Hampshire R. Co. The amount of this subscription was to be expended in the construction of the road in Clarke county. The railroad company, desiring to avail itself of this subscription in advance of the construction of the road into Clarke county, contracted with the county to receive, in payment of its subscription, \$100,000 of its bonds, and at the same time the railroad company executed to this county its obligation, with a deed of trust to secure it, by which, in substance, the company agreed to indemnify the county against liability for the interest in these bonds until the road should be constructed into the county, and against liability for the principal of the bonds if the road

should not be so constructed before their maturity, to-wit, by the year 1892. Inasmuch as this liability was contingent and uncertain as to duration, and consequently not susceptible of exact ascertainment in any fixed sum, in decreeing the foreclosure of the several mortgages this deed of trust was not foreclosed, but the property was sold subject to the same. These \$100,000 of bonds were delivered to the company on the sixth day of August, 1858. When it executed its mortgage of April 1, 1871, it owned such of them as it had not sold or hypothecated.

The contention here is as to the ownership of such of these bonds as were hypothecated, and subsequently redeemed from the proceeds of the sale to appellants.

Barton & Boyd for the railroad company.

John M. Johnson, F. L. Smith, R. H. Lee, Henry Heaton, H. O. Claughton, and Chas. E. Stuart for Lewis and others.

LACY, J. This is an appeal from the circuit court of the city of Richmond, rendered on the sixteenth day of February, 1885. The suit was a creditors' bill to sell the property of an insolvent corporation known as the "Washington & Ohio R. Co." and subject the same to the claims of its creditors. In the sale to enforce the liens upon the property of this company, one only was not enforced. This was the first lien upon the property of the company, created by the original corporation to which the Washington, Ohio & Western R. Co. has succeeded, and was created by the said original corporation, known by the name of the "Alexandria, Loudoun & Hampshire R. Co.," August 6, 1858, to secure to the county of Clarke the obligations of a bond executed to that county by the said "The Alexandria, Loudoun & Hampshire R. Co." The nature of this obligation was as follows: The county of Clarke had subscribed to the capital stock of this company \$100,000 conditioned to be expended in the construction of the road in that county. The railroad company, not having reached the county of Clarke in the construction of its road, arranged with the county to receive the subscription in \$100,000 of the bonds of the county, and the company executed a trust deed to secure its bond for that amount, conditioned that the company should pay the interest on these bonds until the road should be constructed into that county, and to indemnify the county against the principal of the bonds unless the road should be so constructed in the county before 1892, the period of their maturity. The property was sold subject to this lien, as it was a contingent liability only. These bonds were duly delivered to the company.

As has been said, these bonds amount to \$100,000. At the date of the mortgage under which the sale was made in this case, the company had sold some of these bonds, had hypothecated others, and still held undisposed of some others. As to those sold,

the purchasers of the road, the appellants here, make no contention; that is, assert no claim; as to those held by the insolvent corporation, there is no claim made by the creditors of the insolvent corporation; but as to the bonds hypothecated this dispute is made.

The said hypothecated Clarke county bonds were so hypothecated, along with the bonds of the Washington & Ohio R. Co. protected by the mortgage under which the sale was made; and, when the purchase-money was applied by the court to the extinguishment of the debts secured, the hypothecated Clarke county bonds were thus redeemed, and came into the hands of the court, whereupon the question arose as to whom do they belong—the purchasers at the sale, or to the creditors of the Washington & Ohio R. Co.? The purchasers claim that, as their money (so their claim is stated) was used to redeem them, they belong to them, the said purchasers. On the other hand, it is claimed that the purchasers, under the provisions of section 45, c. 61, Code 1873, succeeded to the rights, etc., of the first company, but became liable only for the debts of the first company, which were assumed by them only; that, under the sale in this case, the sale was expressly subject to this lien for the \$100,000 Clarke county bonds; that the purchasers assumed this obligation of the company, whatever it should be; that the rights of the purchasers were, as to these bonds, exactly such as the rights of the first company were—that is, those the first company held at the date of the sale they were entitled to hold, and did so hold without question; that as to those sold they could do what the first company could do, and no more—that is, meet whatever liability should eventually accrue upon them at maturity in 1892, or sooner, if the county of Clarke should pay them, be relieved of all liability as to them; that, as to those hypothecated, they had the same rights, obligations, and powers which the first company possessed, and none others—the sale having been made without affecting them, the new company stepping into and filling the place of the first company as to these, exactly as it did step into and fill the place of the first company as to those unsold, and not hypothecated.

The first company had the right to pay off the debts secured by these, then redeem and receive them again into its possession. The circuit court, in order to protect the purchasers against the debts in question, having paid them off with the purchase-money which belonged to the creditors of the company, and having thus redeemed bonds (Clarke county bonds) for which the purchasers were liable under their contract of purchase, the said court held that the said new company could only become entitled to the said county of Clarke bonds by the performance of the conditions which bound

CONTENTIONS OF
CREDITORS AND
PURCHASERS.

BONDS ARE HELD
FOR BENEFIT OF
CREDITORS.

the first company, to wit, by paying off the debts for which they were hypothecated; the first corporation had a right to whatever was left after satisfying these bonds; and that, the bonds having been redeemed by the money held in trust by the court for the benefit of creditors of the first corporation, the new corporation could only receive these bonds by paying back into the trust fund the amount by which it had been depleted for their benefit and profit. This decree of the circuit court of Richmond is plainly right for the foregoing reasons, and the same will be affirmed here. The several amounts of the Clarke county bonds, held, respectively by complete purchasers by others as collateral security, and retained unsold by the first company, have not been set forth herein, that being wholly immaterial. The lien to secure the obligation to protect the Clarke county bonds having been expressly reserved at the sale, and assumed by the purchasers, the appellant company, their obligation as to all is the same, that is, to step into the place of the old company as to them.

In doing this, they are not required to pay more than by their purchase they agreed to pay. They agreed to pay the purchase price, and assume the liabilities, whatever they were, as to the preferred lien, and this is all they have been required to do. Their money was not used to redeem these bonds when they acquired the purchased property. The purchase-money did not belong to them. It stood in the place of the property they had purchased. Their agreement was to buy the property of the first company, subject to the obligations of the first lien; and to this alone they have been held, which, as we have said, is plainly right.

The decree of the circuit court is affirmed.

PORTER

v.

PITTSBURGH BESSEMER STEEL CO.

(120 U. S. Supreme Court Reports, 649.)

Unsecured floating debts due by a railroad company for construction, *held*, in the absence of a statutory provision, not to be a lien on the railroad superior to the lien of a valid mortgage on it, duly recorded, and of bonds secured thereby, and held by *bona fide* purchasers for value.

The question of what is a final decree, from which an appeal can be taken, considered.

APPEAL from the circuit court of the United States for the district of Indiana.

These were five appeals brought by Henry H. Porter, in which the Pittsburgh Bessemer Steel Co. (Limited), the Cleveland Rolling Mill Co., the Smith Bridge Co., Crerar, Adams & Co., and Volney Q. Irwin are severally appellees.

The material facts out of which the questions for consideration arose were as follows :

In March, 1880, the Indiana & Chicago R. Co. was incorporated to construct and operate a railroad from a point on the State line of Indiana, in Lake county, to Attica, in Fountain county, Indiana. William Foster was the chief promoter of this enterprise, and was the president of the company, and of its successor, the Chicago & Great Southern R. Co., from the organization of the Indiana & Chicago R. Co. down to March 15, 1882. From March, 1880, to June 23, 1881, Foster owned substantially all of the stock of the Indiana & Chicago R. Co. which had been issued, a few shares being held by the other directors, and he controlled the enterprise. Prior to June 23, 1881, the work of construction and of procurement of the right of way had progressed so far as Foster could procure and pay for the same, by the issuing of \$50,250, par value, of paid up capital stock of the company, of all of which stock Foster had on June 23, 1881, become the owner.

Prior to June, 1881, Henry Crawford purchased from A. J. Dull and Henry McCormick the entire capital stock, being 8648 shares of the Chicago & Block Coal R. Co. This was a company organized and incorporated by the purchasers, at a foreclosure sale, of the Indiana North & South railroad, and it owned and operated a railroad extending south from Attica, through Veedersburg, in Fountain county, to Yeddo, a little over twenty miles in length. It has also procured some right of way and constructed some road-bed south of Yeddo, in the direction of Brazil, Indiana. The purchase price of this stock was \$200,000. Crawford made a cash payment of part at the time and gave his notes for the residue, the stock remaining in pledge with the vendors, as security for the payment of the notes.

On June 23, 1881, Foster sold to Crawford 1005 shares of the capital stock of the Indiana & Chicago R. Co., of the par value of \$50,250, under a written contract, by which Foster guaranteed to Crawford that the stock thus sold was all of the capital stock of the company, excepting \$10,000 par value, still held by Foster, and that the company was under no obligation to issue any more stock, except a small amount for rights of way contracted to be paid for in stock. In connection with this contract, a certificate of the secretary of the Indiana & Chicago R. Co. was delivered to Crawford, showing the exact amount of capital stock then outstanding. The \$10,000 of stock retained by Foster had been issued to him in payment of his salary and personal expenses in connection with the enterprise.

On June 23, 1881, the company had no assets excepting the road-bed and right of way, which had been constructed and procured with the money represented by the \$50,250 of stock, and excepting some \$50,000 of aid voted by certain townships along the line, but not yet collected.

Foster remained president, and his board of directors remained directors until March 15, 1882. Immediately after his purchase of the stock on June, 23, 1881, Crawford, without any specific contract with the Indiana & Chicago R. Co., began furnishing from his own means the money and material with which the work of constructing the road was carried on.

On July 14, 1881, the board of directors of the company, at a special meeting, adopted a resolution changing its name to that of "The Chicago & Great Southern R. Co." On October 29, 1881, the board of directors of the Chicago & Great Southern R. Co. adopted resolutions authorizing the execution of the mortgage and the issuing of the bonds involved in this litigation. At that time Crawford was not a director or officer of the company. The mortgage and the bonds bear date November 1, 1881. The resolutions authorized the issuing of bonds to the amount of \$2,000,000, and the mortgage secures that amount. The mortgage was made to John C. New, as trustee, and describes the mortgaged premises as follows: "All and singular the northern division of railway of the said party of the first part, as the same now is or may hereafter be constructed, between Brazil, Clay county, Indiana, extending northwardly through the counties of Clay, Parke, Fountain, Warren, Benton, Newton, and Jasper, to a junction with the Louisville, New Albany & Chicago railway, at or northwest from Rensselaer, Indiana, being about one hundred miles in length.

Between June 23, 1881, and January 1, 1882, Crawford furnished from his own means over \$300,000, which was paid out for work and material used in constructing the road between Attica and the junction at Fair Oaks, northwest of Rensselaer. In addition to this, Crawford, prior to January 1, 1882, had paid out of his own means to Cull and McCormick, upon his purchase of the stock of the Chicago & Block Coal Co., the sum of \$85,000, leaving \$115,000 and all interest still unpaid.

From June 23, 1881, onward, Foster and his board of directors looked to Crawford to furnish the money and material with which to carry on the work of construction.

In pursuance of the resolutions of October 29, 1881, the mortgage was prepared and executed, and was duly recorded, in November, 1881, in the several counties through which the line of the railroad ran.

About the last of December, 1881, Foster, then president of the Chicago & Great Southern R. Co., executed and delivered to Crawford—the actual delivery being made to one Starin, an em-

ployee of Crawford, at Crawford's office at Chicago, Crawford being absent—1000 bonds, each for \$1000, negotiable in form, and payable to New or bearer, making \$1,000,000, the payment of the bonds and of the interest coupons attached thereto being secured by the said mortgage. At the same time with the delivery of the bonds, Foster also delivered to Starin, for Crawford, the following memorandum, unsigned, but in the handwriting of Foster:

"Memorandum of agreement between the Chicago & Great Southern R. Co. and Henry Crawford as to applying the proceeds of an issue of one million dollars of bonds under date of November 1, 1881.

"First. In payment of Block Coal road, purchased by said Crawford, and the contract assigned by him to the Chicago & Great Southern R. Co., with which it is to be consolidated, as provided by law.

"Second. To reimburse said Crawford for money advanced, and to be hereafter advanced, for construction and equipment of the Chicago & Great Southern railway, which the bills of purchase and vouchers for the necessary payments shall be the evidence of expenditures made.

"Third. Any balance from the proceeds of the first issue or any subsequent issue shall be used and applied to the extension and development of the line of road covered by the mortgage of November 1st, 1881.

"Fourth. It is understood and agreed that said Crawford is to furnish the necessary amount of money to pay the debts contracted since the 1st of July, 1881, and to complete grading and superstructure, and to furnish and equip the line of road from junction with Air Line to Attica, as fast as the work can be done."

Prior to the delivery of the bonds by Foster to Crawford, Crawford had assigned to the Chicago and Great Southern R. Co. his contract with Dull and McCormick for the purchase of the stock of the Chicago & Block Coal R. Co. When the bonds were thus delivered to Crawford he had no official connection with the company, but owned \$50,250 of its stock, and had furnished to it a large amount of money, which it had paid out for construction.

In December, 1881, Crawford's note to Dull and McCormick matured and was unpaid. Crawford negotiated with Dull for an extension of time, and Dull agreed to give the extension if Crawford would deposit with him, as additional collateral security, all of the bonds then issued by the Chicago & Great Southern R. Co., and all the stock which he had bought from Foster, and if he would also, by an agreement with New, the trustee, prevent the issue of any more bonds without Dull's written consent. This arrangement was carried out, and, on the 27th of January, 1882, Crawford delivered to Dull all of the stock which he had bought from Foster, and the 1000 bonds which Foster had delivered to him, and.

also procured from New the following paper, which was delivered to Dull:

"I, John C. New, of the city of Indianapolis, in the State of Indiana, do hereby make known, that, as trustee in a certain mortgage or deed of trust, bearing date the 1st day of November, 1881, made and executed by the Chicago & Great Southern R. Co., a corporation of the State of Indiana, to me, as trustee, covering the railroad and other property of said company, to secure a certain issue of first-mortgage bonds of said company, aggregating the sum of two millions of dollars, I have, as such trustee, certified for issue one thousand of said bonds, of one thousand dollars each, and no more, and, at the request of Henry Crawford, Esq., of Chicago, I agree that I will, as such trustee, certify no more of said bonds without the consent in writing of A. J. Dull, Esq., of Harrisburg, Pa.

"Dated at New York, January 27, 1882.

JNO. C. NEW, *Trustee.*"

At this time, the balance due to Dull and McCormick was \$115,000 and interest. The \$85,000 which Crawford had paid to Dull and McCormick was in addition to the money he had furnished for constructing the new road north from Attica.

In February, 1882, the work of constructing the railroad being still in progress, and Crawford still continuing to furnish, without any contract with the company, the money used in prosecuting the work, he requested Foster and his board of directors to enter into a construction contract with him, and he sent to the board a written contract which he desired it to execute. The board, on the 7th of February, 1882, unanimously rejected the contract. Crawford then procured Foster to call another meeting of the board, which was held on March 15, 1882. Crawford attended this meeting, it being the first at which he was present. Becoming satisfied that Foster would prevent any contract or settlement from being made with him, unless he would buy from Foster the \$10,000 of stock still held by Foster, he purchased that stock from Foster, and the two entered into a written contract, dated March 15, 1882, by which Crawford became the owner of all the remainder of the capital stock of the company. Crawford on the same day assigned and transferred to each of the following persons one share of the capital stock of the company, viz.: Henry Crawford, Jr., William A. Starin, D. H. Conklin, F. F. Lacey, H. Moore, G. W. McDonald, D. J. Lyon, and H. Meiselbar. On the same day, Foster and his board of directors, at the request of Crawford, resigned, and Crawford caused himself and the eight persons above named to be elected directors of the company. On the same day, Crawford was elected president of the company, and remained such for four days, until March 18, 1882, when he ceased to be president and director; and he had no official connection with the company from

that time until April or May, 1883, when he was again elected director and president.

On March 18, 1882, the new board of directors passed a resolution approving the mortgage to New, and ordering it to be copied at length in the minutes of the meeting, which was done. At the same meeting the board of directors entered into a construction contract with Crawford. Between June 23, 1881, the date of Crawford's first purchase of stock from Foster, and March 18, 1882, the date of the construction contract, Crawford had paid out of his own means, for labor and material used in the construction of the company's railroad north from Attica, about \$400,000, and for the purchase of the stock of the Chicago and Block Coal railroad, extending south from Attica, \$85,000.

The Chicago & Block Coal R. Co., and the Chicago & Great Southern R. Co. were consolidated in the spring of 1883, under the name of "The Chicago & Great Southern R. Co." On the 9th of April, 1883, the consolidated company executed and delivered to John C. New, as trustee, a deed of further assurance, covering the railroad and property of the Chicago & Block Coal R. Co., extending southwardly from Attica to Yeddo, in addition to the property covered by the mortgage of November 1, 1881, and making the first-named property a further security for the bonds issued under the mortgage of November 1, 1881. This deed of further assurance was duly recorded in the counties along the line of the railroad.

The work of construction was carried on until January, 1883, Crawford furnishing from his own means all the money paid for labor and material used in the construction between June 23, 1881, and January 5, 1883, except about \$40,000 received on account of aid voted by certain townships along the line, which was also expended in paying for construction. Between January 23, 1882 (the date at which Crawford pledged the bonds and stock to Dull and McCormick), and January 5, 1883, Crawford had been endeavoring either to sell the bonds so pledged to Dull and McCormick or to hypothecate them for a loan sufficiently large to pay off Dull and McCormick, and also to furnish money to build the road from Fair Oaks to Attica. Between June 23, 1881, and January 5, 1883, there had been paid out for the construction of the railroad about \$500,000, all of which had been furnished by Crawford, except about \$40,000 received from township aid.

On January 5, 1883, Crawford negotiated a loan from Drexel, Morgan & Co., a banking-house in the city of New York, under a written contract. This contract provided for a loan of \$400,000, \$250,000 to be paid at once, out of which the balance due to Dull and McCormick for the Chicago & Block Coal railroad was to be paid; \$50,000 more to be paid when the new road should be completed from Iroquois River to Fair Oaks; \$50,000 more when the road should be completed eight miles south from Oxford, and when

Crawford should furnish satisfactory proof to Drexel, Morgan & Co. that he had put into the work \$50,000 of his own money, in addition to all the moneys theretofore expended by him upon the construction of the road; the last \$50,000 to be paid when the line should be completed from Fair Oaks to Yeddo. Crawford was to procure the consolidation of the Chicago & Block Coal railroad with the Chicago & Great Southern railway. As security for this loan, all of the capital stock of the Chicago & Block Coal R. Co., all of the capital stock of the Chicago & Great Southern R. Co., and all of the bonds of the latter company, either then issued or thereafter to be issued, were to be delivered to and held by Drexel, Morgan & Co. Crawford was to give his individual notes for the loan, and Drexel, Morgan & Co. were to appoint, and did appoint, an agent to superintend the expenditure of all the money to be advanced by them, the money to be paid out only upon drafts drawn by Crawford and approved and countersigned by such agent. Under this contract, Drexel, Morgan & Co. advanced \$350,000. As part of it they paid to Dull and McCormick, on January 5, 1883, \$132,379.99, being the entire balance due on the purchase of the stock of the Chicago & Block Coal R. Co., and received from Dull and McCormick all of the stock and bonds which they held as collateral. Drexel, Morgan & Co. received this stock and these bonds, not from Crawford, but from Dull and McCormick, Crawford never having had possession or control of the stock or the bonds from the time when he pledged them to Dull and McCormick. The remaining \$217,620.01 was paid by Drexel, Morgan & Co., through their agent, directly for labor and material used in the construction of the railroad, and was paid at various times between January 5, 1883, and September, 1883. During the same period, Crawford, in addition to what he had theretofore expended out of his own means in the work of construction, and in addition to the money so paid by Drexel, Morgan & Co., paid out of his own means more than \$50,000 for labor and material used in the construction of the railroad between Oxford and Attica. From January 5, 1883, to September, 1883, the contractors, sub-contractors, furnishers of material, and laborers were informed and understood that the money paid to them from time to time during that period was mainly derived from a loan negotiated upon the mortgage bonds of the railway company. Each of these five appellees knew of the pledge of these bonds to Drexel, Morgan & Co. for this loan, and knew that they were getting part of the money loaned by Drexel, Morgan & Co.

After the Drexel, Morgan & Co. loan was exhausted, the work of construction was continued, the money paid for labor and material being furnished by Crawford, until about February, 1884, when the new road was so far constructed as to enable trains to be run from Attica to the junction at Fair Oaks. On February 18,

1884, Crawford submitted to the board of directors a report showing the then condition of the work, and asked the board to issue to him, in addition to the \$1,000,000 of first-mortgage bonds theretofore issued, a further sum of \$200,000 of the first-mortgage bonds, \$1,200,000 of capital stock, and \$1,200,000 of income bonds, as a payment to him on account. On the same day the board of directors passed the following resolution: "That, as a payment on account for the work done and material furnished up to the present time under such construction contract, there be allowed and paid to the contractor or order the sum of two hundred thousand dollars of first-mortgage bonds (in addition to the one million dollars heretofore appropriated), and also (\$1,200,000) one million two hundred thousand dollars of income bonds, and (\$1,200,000) one million two hundred thousand dollars in the common stock, full paid, of this company, the proper officers of the company to execute the foregoing resolutions and take the proper vouchers for all payments."

No income bonds were ever issued by the company. On May 5, 1884, at the request of Crawford, the board of directors adopted a resolution providing for an exchange of the old Indiana & Chicago R. Co. stock, and of the old Chicago & Block Coal R. Co. stock, for new stock of the consolidated Chicago & Great Southern R. Co. At the same meeting the board passed a resolution that, in addition to the consolidated stock to be issued in exchange for the old stock of the original companies, the secretary should issue and deliver to the contractor additional new stock as payment under the construction contract, so as to make the total consolidated stock outstanding amount to \$1,200,000, par value. This exchange of stock was made, and enough additional new stock of the consolidated company was issued to make its total stock outstanding amount to \$1,200,000, par value, all of which stock was delivered to Drexel, Morgan and Co, under their contract of loan. When Dull and McCormick, on January 5, 1883, delivered their stock and bonds to Drexel, Morgan & Co., they also delivered to the latter the following consent:

"John C. New, trustee:

"I hereby consent to the issue and certification of the remaining \$1,000,000 of Chicago & Great Southern railway bonds, whenever you are so requested to do by Drexel, Morgan & Co.

"New York, Jan. 5, 1883.

A. J. DULL."

The additional \$200,000 of bonds which Crawford was authorized to receive by such resolution of the board of February 18, 1884, were issued. Drexel, Morgan & Co. procured New as trustee, to certify them, and they were delivered by Crawford to Drexel, Morgan & Co. in August, 1884.

While the construction of the railroad was in progress Crawford

became indebted to the First National Bank of Chicago in the sum of about \$300,000, about two thirds of which money Crawford expended in the construction of the Chicago Air Line railroad, and about one third of it in the construction of the Chicago & Great Southern railway. While the bonds and stock of the Chicago & Great Southern R. Co. were so held in pledge by Drexel, Morgan & Co., Crawford gave to the First National Bank of Chicago a second pledge of the same bonds and stock to secure the payment of his indebtedness to the bank, he having already pledged to it certain other securities and property as collateral. Crawford's notes to Drexel, Morgan & Co. matured and were not paid. Drexel, Morgan & Co., under the power given to them in their contract with Crawford, of January 5, 1883, advertised the pledged bonds and stock to be sold on June 2, 1884. By a written agreement between Crawford and Drexel, Morgan & Co., made May 27, 1884, the sale was postponed to June 20, 1884. In the meantime, Samuel M. Nickerson, president of the First National Bank of Chicago, which held the second pledge of the securities held by Drexel, Morgan & Co., and Henry H. Porter, a director and stockholder of the bank, entered into negotiations with Drexel, Morgan & Co. respecting the purchase of the bonds and stock from them, if Crawford should further fail to pay his debt to them and to redeem the securities. These negotiations resulted in a contract between Crawford and Drexel, Morgan & Co., by which the time of payment was extended for sixty days from June 20, 1884, and a further contract between Nickerson and Porter of the one part, and Drexel, Morgan & Co. of the other part, by which Nickerson and Porter agreed to buy the pledged securities from Drexel, Morgan & Co., and to pay them their claim in full with interest, if Crawford should fail to pay his debt to them at the expiration of the sixty days. These two contracts were both of them dated June 25, 1884. Crawford failed to pay his debt to Drexel, Morgan & Co. within the sixty days. Prior to January 12, 1885, Porter purchased Nickerson's interest in the contract of June 25, 1884, between Nickerson and Porter, and Drexel, Morgan & Co. On January 12, 1885, Porter paid to Drexel, Morgan & Co. \$392,363.24 by drafts, and sent them the drafts inclosed in a letter, in which Nickerson concurred. Drexel, Morgan & Co. received the payment and delivered the pledged bonds and stock to Porter, accompanying the delivery with a letter giving in detail a list of the stocks, bonds, notes, agreements, and papers held by them as collateral to the loan. One of the papers inclosed by them to Porter was a consent signed by them authorizing New, as trustee, to certify the remaining uncertified \$800,000 of first-mortgage bonds whenever so requested to do by Porter. Porter associated with himself certain other persons, who entered into a subscription or syndicate agreement, for the purpose of buying in

the railroad and reorganizing, completing, and extending it. By this agreement it was provided that Porter, as the agent and attorney of the parties concerned, should go on "in his own name" and foreclose the mortgage, sell the property, bid it off, reorganize the company, and convey the property to be purchased under the foreclosure to the reorganized company. The agreement was, in effect, one by the subscribers to pay so much money for so much stock and bonds of the new company to be organized after the foreclosure and sale by Porter. It gave to Porter absolute power over and control of all the bonds of the existing company, with full authority in his own name to foreclose the mortgage and reorganize the company upon the foreclosure purchase, and conduct and control the new enterprise.

On December 26, 1884, Porter and Crawford entered into a contract under which Porter and the syndicate represented by him purchased and became the absolute owner of any and all right Crawford might have to redeem from Porter the bonds and stock he should receive from Drexel, Morgan & Co., by paying to him the amount he should pay to them. This contract recognized the right of Crawford so to redeem the bonds and stock. Drexel, Morgan & Co. did not sell the bonds and stock at public auction on notice, but sold to Porter at private sale their debt against Crawford, and put Porter in their place as to the collateral security for the debt. Crawford was willing that Porter should take the bonds and stock in this way if he (Crawford) could still have an opportunity to protect his second pledge of them to the First National Bank of Chicago. By this contract Porter and his associates fixed the ultimate price they were willing to pay for the bonds and stock, which price left a margin for the bank after paying off Drexel, Morgan & Co. On the same day, and as a part of the same transaction, Crawford, by written assignment, transferred to the First National Bank of Chicago all of his right, title, and interest in and to the contract of the same date between himself and Porter, and all the rights, claims, demands, moneys, and payments he (Crawford) might be or become entitled to by reason of and under that contract. These two instruments simply constituted the method pursued to protect the bank in its second lien upon the bonds and the stock, and were entered into for the purpose of securing to it any margin of value there might be in the bonds and stocks, after paying the Drexel, Morgan & Co. debt.

The amount of money furnished by Crawford and expended in the construction of the railroad during the time the Drexel, Morgan & Co. loan was being used in construction, and during the time after that loan was exhausted, amounting to at least \$250,000, in addition to the moneys which Crawford had theretofore paid out for such construction. The total expenditure in constructing the Chicago and Great Southern railway was something over

\$1,000,000, all of which came from Crawford's private means, and from the Drexel, Morgan & Co. loan, except some \$40,000 or \$50,000 received from aid voted by some townships along the line. The mortgage bonds involved in this litigation represent this \$1,000,000 expended in construction, and the accrued interest thereon. The railroad from Yeddo to Fair Oaks was opened for business in April or May, 1884. Prior to the appointment of a receiver, on October 28, 1884, the company did not earn sufficient money to pay its operating expenses. No interest was ever paid on any of the mortgage bonds issued by the company. Crawford never received anything from the company for personal services or expenses, or any repayment of moneys expended by him in constructing the railroad.

On October 27, 1884, John Hack and others filed a creditors' bill in the Circuit Court of Jasper County, Indiana, against the Chicago & Great Southern R. Co. and Henry Crawford. On the same day that court entered an order appointing Philip B. Shumway receiver. Afterward, on March 5, 1885, Crawford filed his answer in the suit, disclaiming all interest in its result, and upon that answer an order was entered that Crawford recover from the plaintiffs his costs, and that he had no interest in any controversy pertaining to the action. On February 26, 1885, the court removed Shumway and appointed as receiver, in his stead, William Foster. In the order appointing Foster there was this provision:

"And the Court, as a condition of the appointment of said receiver, reserves the right to make any further order respecting the priority and payment of labor and supply claims accruing prior to the receivership herein as may hereafter seem and appear to the court to be equitable and just."

On the 4th of April, 1885, the Hack suit was removed into the Circuit Court of the United States for the District of Indiana. On the 9th of March, 1885, Porter filed in that court his bill of complaint against the Chicago & Great Southern R. Co., John C. New, trustee, and others, alleging that New, as trustee refused to bring the suit, and praying for the foreclosure of the mortgage of November 1, 1881, and of the deed of further assurance of April 9, 1883. On the 18th of April, 1885, this suit and the Hack suit were consolidated under the title of the Porter suit. On April 29, 1885, and August 15, 1885, orders were entered authorizing the receiver to issue certificates to pay receiver's indebtedness, and to make needed repairs and replacements on the railroad. Under these orders receiver's certificates, amounting in the aggregate to \$153,000, were issued. The railway company filed an answer in the consolidated suit, admitting the averments of the bill. A degree *pro confesso* was entered against New, trustee. Various creditors of the company were made parties defendant to the bill, some being judgment creditors and some not. Other

creditors filed intervening petitions. In May, 1885, the trustees of four townships, two in Benton County and two in Newton County, which had voted aid in the construction of the railroad amounting to about \$40,000, applied to the court, as trustees of common schools, to be made defendants, and to be allowed to defend against the foreclosure; but the application was denied.

In June, 1885, the same trustees, as trustees of the townships voting aid, applied to be permitted to defend against the foreclosure, as minority stockholders. This application was denied on the ground that under the statutes of Indiana the individual taxpayers of the townships which had voted aid were entitled to the benefit of the stock in proportion to the amount of taxes paid by them respectively. Thereupon, John W. Swan and Cephas Atkinson, as tax-payers of two townships, applied for leave to become defendants and to defend against the foreclosure. Without disposing of that application the court, on the 17th of August, 1885, entered a decree of foreclosure and sale.

On the 30th of September, 1885, the application of Swan and Atkinson was reheard by the court, and it entered an order admitting Swan and Atkinson as defendants, and allowing them to file their petition and answer. The order contained this provision: "This order shall in nowise affect the decree heretofore made for the sale of the railroad by the court of rights or parties thereunder." Swan and Atkinson filed their petition and sworn answer, charging that the mortgage and the bonds were fraudulently executed and issued, and were without consideration and void, and that Crawford's construction contract was fraudulent and void. On October 8, 1885, Swan and Atkinson and others filed a petition to set aside the foreclosure decree of August 17, 1885, containing substantially the same charges against the mortgage that were contained in the answer of Swan and Atkinson. On the 12th of October, 1885, the court set aside the foreclosure decree, and made an order giving the defendants thirty-nine days in which to take their evidence "as to so much of said case as involves the validity of the mortgage and mortgage debts, as the same are described in the bill of said Porter and the defendants' answers." Porter filed a replication to the answer of Swan and Atkinson.

Voluminous testimony was taken, on which the case was heard, and a decree of foreclosure was entered on the 16th of February, 1886. That decree denied the relief prayed by the answer of Swan and Atkinson, as stockholders, and dismissed their petition. It declared that 1,200 of the mortgage bonds were issued and delivered by the company to Crawford; that 1,000 thereof were to be accounted for by Crawford under the construction contract; that 200 of them were delivered to Crawford under that contract; that the 1,200 bonds were sold and delivered by Crawford to Porter and his associates, and that the remaining 800 of them had never been

issued. It recited the making, delivery, and recording of the two mortgages of November 1, 1881, and April 9, 1883; that the company defaulted in paying the interest due July 1, 1882, on the bonds; that there were \$291,860 of interest in default upon the bonds issued; and that the mortgages "are valid and binding obligations as against the" company, and a paramount lien on all the property thereby conveyed, "excepting as hereinafter provided." It then proceeded to decree as follows:

"Sixth. That all unpaid valid claims against said railway company, accrued for right of way, lands, labor, rolling-stock, and material used in the construction and betterment of said railway, whether reduced to judgment or remaining in open account, are hereby adjudged and decreed to be prior, superior, and paramount to the lien of the said mortgages or deeds of trust and the bonds secured thereby; that all unpaid valid claims for labor, supplies, rolling-stock, and material used in the operation of said railway prior to the appointment of a receiver, whether reduced to judgment or remaining in open account, are hereby adjudged and decreed to be prior, superior, and paramount in lien to the said lien of said mortgages or deeds of trust and the bonds secured thereby; and all of said claims accrued in the construction of said railway and its betterment; and all of said claims accrued in the operation of said railway, prior to the appointment of a receiver, as hereinabove in this paragraph of this decree described, are hereby adjudged and decreed to be prior, superior, and paramount in lien to the lien of any and all receiver's certificates issued under the order of this court in this cause, excepting only receiver's certificates to the amount of twenty-three thousand dollars (\$23,000), issued under the order of this court of April 29, A.D. 1885, the proceeds of said certificates other than said twenty-three thousand dollars (\$23,000) representing construction or betterment of said railway.

"Seventh. That all court and receiver's indebtedness accrued against said property since the appointment of a receiver is hereby adjudged and decreed to be prior, superior, and paramount in lien to the lien of said mortgages or deeds of trust and the bonds secured thereby."

It then provided for the sale of the mortgaged property at public auction, by a master, for not less than \$500,000; for the payment of the purchase-money into the registry of the court; and for a reference to the master to take testimony and report his findings and such testimony as to certain specified matters, among which was the following:

"5. The amount due the several claimants under the sixth paragraph of this decree, showing the amount due each claimant and the aggregate amount due upon each of the two classes of the claims mentioned in said sixth paragraph."

On March 27, 1886, the railroad was sold by the master, and

bought by Porter, for \$501,000. On April 5, 1886, the sale was confirmed by the court, and the purchaser was empowered to pay, as cash, in part payment of the purchase-money, all receiver's certificates outstanding, then amounting, with interest, to \$157,884.64, the remainder of the purchase-money, \$343,115.36, being paid in cash.

The reference was had before the master and much testimony was taken upon it. On August 31, 1886, the master filed his first report under the reference, in which he allowed the following claims at the following amounts: The Cleveland Rolling Mill Co., \$29,643.97; Crerar, Adams & Co., \$7809.94; the Smith Bridge Co., \$20,900.24; the Pittsburgh Bessemer Steel Co. (Limited), \$12,944.20. Porter duly filed exceptions to these allowances. On October 8, 1886, the master filed his report as to the claim of Irwin, allowing it at the sum of \$10,950.30. Porter duly excepted to this allowance. On October 9, 1886, on a hearing on the reports and exceptions, the court made the following decree:

"First. That the said five several defendants, claimants and intervening petitioners hereinbefore named have each done work or furnished materials which have been used in the construction and betterment of the railway of said Chicago & Great Southern R. Co. prior to the appointment of the receiver therefor, which respective claims for such labor and material are valid claims against said railway company to the amounts hereinafter named, and which said amounts are adjudged and decreed to be valid claims under and in pursuance of the sixth paragraph of the decree heretofore, on February 16, 1886, entered in this cause, prior and superior and paramount to the lien of the mortgages or deeds of trust in said decree mentioned and the bonds secured thereby.

"Second. And the court further finds that there is now in the registry of this court to the credit of this cause the sum of \$325,194.27, derived from the sale of said property, and remaining after the payment of all receiver's certificates and certain of the indebtedness incurred by the court since it assumed the control and management of said railroad, and which sum is largely in excess of the total amount of claims filed or proven under the terms of said decree entered on February 16, 1886, including all unpaid costs and indebtedness incurred by the court since it took possession of said railway property.

"Third. And the court further finds that there is due to the Smith Bridge Co. the sum of \$20,900.24, with interest to be added from October 27, 1884, at the rate of six per cent per annum.

"That there is due to the Cleveland Rolling Mill Co. the sum of \$29,643.97, with interest to be added from October 27, 1884, at the rate of six per cent per annum.

"That there is due to Crerar, Adams & Co. the sum of \$7809.94

with interest to be added from October 27, 1884, at the rate of six per cent per annum.

"That there is due to the Pittsburgh Bessemer Steel Co. the sum of \$12,944.20, with interest to be added from October 27, at the rate of six per cent per annum.

"That there is due Volney Q. Irwin the sum of \$11,450.30, with interest to be added from October 27, 1884, at the rate of six per cent per annum.

Which several sums of money are due to said above-named parties, respectively, for and on account of labor or material used in the construction and betterment of said railway, as provided and set forth in the sixth paragraph of said decree, entered in said cause on February 16, 1886.

"It is, therefore, finally ordered, adjudged, and decreed by the court that the clerk of this court shall pay out of the said fund in the registry of the court to the credit of this cause, the said several sums of money, with interest to be computed thereon, to the said parties, respectively, or their solicitors of record, viz.: To the Smith Bridge Co., the sum of \$23,345.54; to the Cleveland Rolling Mill Co., the sum of \$33,112.32; to Crerar, Adams & Co., the sum of \$8723.71; to the Pittsburgh Bessemer Steel Co., the sum of \$14,458.65; to Volney Q. Irwin, the sum of \$12,789.98.

"Said several payments shall be made, with interest at the rate of six per centum per annum from the date of the entry of this decree, in full payment and discharge of said respective claims against said railway property and franchises."

Porter appealed separately from each of these decrees and orders of payment, and these were the appeals now presented for consideration.

J. E. McDonald, John M. Butler, A. L. Mason, O. Peckham, and R. B. F. Pierce for appellant.

A. C. Harris, W. H. Calkins, John S. Cooper, and E. W. Toler-ton for appellees.

BLATCHFORD, J.—It is alleged that the circuit court erred in decreeing the several claims of these five appellees to be liens on the railroad and property of the original Chicago & Great Southern R. Co. superior to the lien of the mortgage of November 1, 1881; and that it also erred in decreeing these claims to be liens on the railroad and property of the consolidated company superior to the lien of the mortgage of April 9, 1883, conveying the railroad and property formerly known as the Chicago & Black Coal R.

It is urged, in maintenance of the decree below, that the relations which Crawford sustained toward the several appellees when their claims respectively accrued, and his relations to the railway

company, were such as to preclude him from acquiring the mortgage bonds in controversy to the prejudice of the appellees; that his construction contract was fraudulent and void as against the appellees, as creditors of the company; that, as between him and the appellees, he is estopped, by the provisions of his construction contract from claiming the right to a prior lien upon, or an equal distribution of, the proceeds of sale of the property of the company; that the legal situation was that of a nominal corporation vested with the legal title to its property for the use of Crawford as sole beneficiary; that Dull and McCormick received the bonds subject to the same equities against them which could be urged while they were in Crawford's possession; that the equities of the appellees against the \$1,000,000 of bonds in the hands of Drexel, Morgan & Co., were precisely what they were while the bonds were in the hands of Crawford; that the appellees are entitled in equity to be paid out of the assets of the company the amounts of their respective claims in preference to Crawford; that all rights which Nickerson and Porter might have had to be subrogated to the position of Drexel, Morgan & Co. were lost by the syndicate agreement of December 26, 1884; that the legal effect of that agreement was a purchase by Porter directly from Crawford; that the amounts in controversy on these appeals are a part of the purchase price of the securities on such purchase of them by Porter, reserved by him to be paid either to Crawford or to the appellees; that the real controversy here is between Crawford and the First National Bank of Chicago on the one hand and the appellees on the other; that the appellant had no interest in that controversy; that, by the purchase of the securities under the syndicate agreement, Porter was charged with full notice of all the facts from which the equities of the appellees against Crawford and the mortgage bonds arise; that the First National Bank acquired no better sights against the appellees by the assignment to it of Crawford's interest in the syndicate agreement, than Crawford himself had; that the equities of the appellees to be paid the amounts due to them out of the fund in court are superior to those of Porter, as the nominal party, and to those of Crawford, as the real party; and that Porter, by reason of his ownership and possession of over \$700,000 of unpaid capital stock of the company, had no right, as against the appellees, to foreclose the mortgage for the benefit of his bonds until the claims of the appellees should first be paid.

MATTERS URGED
IN SUPPORT OF
DECREE.

The considerations which seem to us to show that the circuit court erred in awarding priority to the claims of these creditors over the mortgage bonds are few and controlling.

The mortgages and the bonds are valid and binding as against the company; the company owes a large debt for the construction of its road, which is represented by the

WHAT IS REPRESENTED BY THE
BONDS.

bonds; there was no bad faith, irregularity, deceit, or fraud in the execution of the mortgages or in the issuing of the bonds thereunder; the bonds in the hands of Porter represent actual values received by the company; they represent the entire purchase-money that was paid for the Chicago & Block Coal R. extending south from Attica to Yeddo; they represent all the money that was paid directly by Drexel, Morgan & Co., through their agent, for the construction of the railroad north of Attica, a considerable portion of which money was paid to these five appellees; they represent all the money that was paid by Crawford out of his own means for the construction of the new railroad north of Attica; in fact, they represent all the money that has ever been paid by the company for the Chicago & Block Coal R. and for the construction of the sixty miles of new road from Attica to Fair Oaks, excepting only some \$40,000 or \$50,000 received from aid voted by townships.

To the objection that, at the time the mortgage of November 1, 1881, was executed and the bonds were issued, Crawford owned the entire stock of the company and dominated the board of directors, and that the mortgage and bonds were issued under his dictation and coercion, even if such an objection could be legally tenable, it is a sufficient answer that when the mortgage was made, and the \$1,000,000 of bonds were issued and pledged to Dull and McCormick, Crawford was not a director or officer of the company. Foster was its president, and he and his associates constituted the entire board of directors, and they remained in full control until March 15, 1882. That this board was not dominated or controlled by Crawford is shown by the fact that when, on February 7, 1882, eleven days after Crawford had delivered in pledge to Dull and McCormick the \$1,000,000 of bonds, Crawford asked the board to enter into a construction contract with him, and sent them a draft of the contract which he desired, the board unanimously rejected it. At the time the mortgage was executed, and at the time the bonds were issued and pledged to Dull and McCormick, Crawford held \$50,250 par value of the stock, and Foster held \$10,000 par value of it. The mere fact that Crawford owned a majority of the stock did not give him the legal control of the company; nor from such ownership can the legal inference be drawn that he dominated the board of directors. *Pullman Car Co. v. Missouri Pacific Co.*, 115 U. S. 587, 596.

The circumstances attending the issuing of the \$1,000,000 of bonds show that they were issued by Foster and his board of directors in good faith, and largely for indebtedness of the company then existing. There is no foundation for the suggestion that the mortgage and the bonds were without consideration, nor does it lie in the mouths of

OWNERSHIP OF
MAJORITY OF
STOCK BY CRAW-
FORD.

BONDS ISSUED IN
GOOD FAITH—
ACTS OF DIRECT-
ORS VALID.

these appellees to raise the objection as to the absence of a legal board of directors of the company; for, if the mortgage and the bonds are invalid for want of such legal board, and for want of the legal existence of the corporation, the contracts between these appellees and the company, upon which their claims are based, are invalid for the same reason, and the consolidation by which the company procured the Chicago & Block Coal Co.'s road would be void, and that road would be free from all debts incurred by the Chicago & Great Southern R. Co. Moreover, the directors were directors *de facto*, who held themselves out to the world as such, under such circumstances that their official acts bind the corporation and all persons who claim under it.

The claims of the appellees are for the original construction of the railroad. This is not a case where the proceeds of the sale of the property of a railroad, as a completed structure, open for travel and transportation, are to be applied to restore earnings which, instead of having been applied to pay operating expenses and necessary repairs, have been diverted to pay interest on mortgage bonds and the improvement of the mortgaged property, the debts due for the operating expenses and repairs having remained unpaid when a receiver was appointed. The equitable principles upon which the decisions rest, applying to the payment, out of the proceeds of the sale of railroad property, of such debts for operating expenses and necessary repairs, are not applicable to claims such as the present, accrued for the original construction of a railroad while there was a subsisting mortgage upon it. These five appellees gave credit to the company for their work. It was construction work, and none of it was for operating expenses or repairs, and none of it went toward keeping a completed road in operation, either in the way of labor or of material. When these claims accrued, the road of the company had not been opened for use. The claims accrued after the mortgage had been executed and recorded, and after \$1,000,000 of the bonds secured by it had been issued and pledged to innocent *bona fide* holders for value. We are not aware of any well-considered adjudged case which, in the absence of a statutory provision, holds that unsecured floating debts for construction are a lien on a railroad superior to the lien of a valid mortgage duly recorded, and of bonds secured thereby, and held by *bona fide* purchasers for value. The authorities are all the other way.

On the facts of this case, the mortgage and the bonds are not affected by the existence of Crawford's construction contract, which was made on the 18th of March, 1882, after the issuing of the bonds and the pledging of them to Dull and McCormick. The amount of those bonds constitute the present value of the entire railroad property. By the construction contract, Crawford, in consideration of the bonds

UNSECURED
DEBTS FOR CON-
STRUCTION NOT
SUPERIOR TO
MORTGAGE LIEN.

CRAWFORD'S
CONSTRUCTION
CONTRACT DOES
NOT AFFECT
BONDS.

and stock which he was to receive under it, bound himself not only to complete, but to equip the road. The contract was not an unfair one. It was performed in part. Only \$200,000 of the bonds were issued after the construction contract was made. At the date of that contract, Crawford was a large creditor of the company for money advanced by him and expended in construction. He had been advancing from his own means large amounts of money, and it was to reimburse to him the \$300,000 or \$400,000 of his own means already expended in the work, and to enable him to complete the payment for the Chicago & Block Coal R., and to proceed with the work of construction, that the \$1,000,000 of bonds were issued to him. All the money received by the company for the bonds went into the property. The property produced by that money has never been worth what was expended in its production. From the date of the construction contract, the company was never able to issue or deliver a single bond under it, except by the consent of Dull and McCormick, or of Drexel, Morgan & Co., the parties who held the bonds and stock in pledge. The advances of money made by Crawford after the date of the construction contract were made without any security to him. Every bond issued after the date of the contract with Drexel, Morgan & Co. was required by that contract to be delivered directly to them, as additional security to them. Crawford realized no profits out of the mortgaged property, and never received anything for his services, or any reimbursement of the large sums of money he expended in this work. On these facts it is impossible to see that the existence of the construction contract can have any bearing upon the case. Under any circumstances, no contract under which about sixty miles of railroad had been constructed would be held invalid for the reasons assigned in this case, without the repayment to the contractor of the amount actually expended by him in good faith under the contract. *Thomas v. Brownville R. Co.*, 109 U. S. 522, 526.

Moreover, it is a well-settled principle that subsequent creditors cannot be heard to impeach an executed contract, where their dealings with the company, of which they claim the benefit, occurred after the contract became an executed contract. *Graham v. Railroad Co.*, 102 U. S. 148. The claims of all the appellees except the Cleveland Rolling Mill Co. accrued after the construction contract was made. As to that company, it, after the construction contract was made, and while Crawford was carrying on the work of construction under it, knowingly received on account of its claims money which came directly from Drexel, Morgan & Co., as a result of the pledge of the bonds to that firm.

Dull and McCormick, Drexel, Morgan & Co., and Porter were respectively, in succession, purchasers in good faith of these bonds, as negotiable commercial securities, without notice of any irregularity

or infirmity in them; and are entitled to the benefit of the principles applicable under such circumstances. Porter paid to Drexel, Morgan & Co. more than \$392,000 in money for the bonds, and, under all circumstances, is entitled to protect his title by that of Drexel, Morgan & Co., and, through them, by the title of Dull and McCormick.

It is contended for the appellees that Porter did not purchase the bonds from Drexel, Morgan & Co., but bought ^{PURCHASE OF BONDS BY PORTER.} them directly from Crawford. The evidence shows that Crawford, after January 27, 1882, the date at which he pledged the \$1,000,000 of bonds to Dull and McCormick, never had one of those bonds in his possession or under his control. Dull and McCormick, not Crawford, delivered the bonds to Drexel, Morgan & Co., upon the payment to them by Drexel, Morgan & Co. of the debt due to them on account of the purchase of the Chicago & Block Coal R. The \$205,000 of bonds issued after the negotiation of the loan from Drexel, Morgan & Co. were at once delivered to them, under their contract of pledge. This pledge vested in them the legal title to the bonds, and Porter purchased that legal title from them. In opposition to this view, it is urged that the terms of the written agreement between Crawford and Porter of December 26, 1884, show that the purchase by Porter was from Crawford; but the true purport and effect of that instrument is, as before stated, a sale by Crawford to Porter and his associates of Crawford's right to redeem the bonds from Porter and his associates by paying the amount of money which Porter had paid to Drexel, Morgan & Co. By the contract of June 25, 1884, between Porter and Nickerson and Drexel, Morgan & Co., the former bound themselves to pay to the latter Crawford's debt to them, upon receiving from them the stock and bonds which they held as collateral to the debt. Nickerson assigned to Porter his interest in this contract, and Porter paid to Drexel, Morgan & Co. the amount of Crawford's debt to them, and took from them the bonds pledged to them by Crawford as collateral. By this transaction Porter became the owner of the legal title to the bonds, and was subrogated to all the rights of Drexel, Morgan & Co. in them. The contract of December 26, 1884, between Crawford and Porter, merely extinguished Crawford's right to redeem the pledged bonds. Under these circumstances, whatever it was that Porter purchased from Crawford, the former would, in equity, be subrogated to all the rights of Drexel, Morgan & Co., and, through them, to all the rights of Dull and McCormick.

Certain clauses in the agreement between Crawford and Porter of December 26, 1884, are cited as creating an equity or lien in favor of the appellees. By one clause in the agreement the syndicate represented by Porter agrees: "Second. To pay and

AGREEMENT BE-
TWEEN CRAW-
FORD AND POR-
TER CREATES NO
EQUITY IN FAVOR
OF APPELLEES.

clear off any and all claims against said Chicago & Great Southern R. Co. which may be decided by the court to be liens upon the said line of railway paramount to the lien of the bonds and coupons secured by the trust deed to said John C. New, dated November 1, 1881, or which the court may decide shall be equitably payable out of the proceeds of the sale of the said line of railway prior to any payment of the said bonds or coupons, including therein any and all claims for right of way and depot grounds, engine-house, and station buildings, water-tanks and shops, between Fair Oaks and Yeddo, both inclusive, bridges and other structures heretofore built and put in place on said railway, and essential to the operation thereof, but the title to which is not in said railway company, and which the court may decide must be paid for in preference to said bonds, and also any and all indebtedness incurred by the receiver in possession of said property prior to January 15, 1885, and not paid out of moneys earned by the operation of said road prior to January 15, 1885." By the same instrument Crawford agrees as follows: "Section 5. The party of the first part hereby, in consideration of the premises, guarantees and agrees that the claims, liens, and other possible indebtedness mentioned in subdivision two, which shall be held to be prior in right to payment over said twelve hundred bonds and coupons, shall not in any event exceed the sum of one hundred thousand dollars (\$100,000)."

These clauses do not create the lien or equity supposed. They leave the question as to the existence of any such "claims, liens, and other possible indebtedness," mentioned in the agreement, to be adjudicated by the court, and also leave to be decided by the court the question of the priority of such claims over the bonds, and merely provide for the rights of the parties as between themselves in case the court establishes such priority. As before said, the purpose of Crawford, in making the agreement of December 26, 1884, was to protect the second pledge of the bonds and stock to the First National Bank of Chicago, he having put into the construction of the railroad about \$100,000 of the money which he had borrowed from the bank; and he immediately assigned to the bank all his interest in the contract with Porter. The contract between Porter and Crawford, and that between Crawford and the bank, having been entered into in contemplation of the purchase of the bonds from Drexel, Morgan & Co. by Porter, the legal relation of the appellees to the company and to its property, as unsecured holders of construction claims, was not affected by these transactions, so as to give them any greater rights against the mortgaged property than they had previously had. In any event, as before said, the bonds would be sustained in the hands of Porter as a first lien, to the amount actually advanced upon the faith of the pledge of them and expended in constructing the rail-

road, with interest. It is found by the final decree that there is now in court \$325,194.27 derived from the sale of the mortgaged property. All the money advanced by Drexel, Morgan & Co. went directly into this property. The amount paid by Porter to Drexel, Morgan & Co. on January 12, 1885, was \$392,363.24, exceeding by \$67,168.97 the entire net proceeds in court, saying nothing about interest for over two years on the amount paid by Porter. This view is entirely conclusive of this case, and shows that there is no fund in court arising from the sale of the property that can upon any principle be held applicable to the payment of the construction claims of these appellees; and this is irrespective of the fact that, in addition Crawford put into this property, in good faith, out of his own individual means, the further sum of \$600,000.

It is contended, however, that Crawford was all the time substantially the owner of the entire railroad property, and that the claims of the appellees were debts due to them from Crawford for work and material in constructing his railroad, and that these claimants have a lien, in this way, superior to the lien of the mortgage bonds. In answer to this view, in addition to the suggestions already made, and treating Crawford as the owner of the railroad, it may be said that the rights of Porter would be no different from his rights as dealing with the company as owner of the property. The delivery by Crawford of the bonds secured by a mortgage made by himself on the railroad, to a third person for a valuable consideration, made the mortgage a valid security, and made the bonds in the hands of Dull and McCormick a valid lien on the railroad. An owner of a railroad, though he may be in debt to those who aid in constructing it by furnishing materials, may still execute a mortgage on it which will be good against unsecured creditors. No more than this was done upon the theory we are now considering. The creditors would have no lien superior to the lien of the bonds. The mortgage was recorded, and the \$1,000,000 of bonds were issued before the claims accrued. It results from these views that the entire purchase-money now in court, arising from the foreclosure sale, after paying the costs and the receiver's indebtedness, should be paid out upon the bonds and coupons secured by the mortgage, in preference to the payment of the claims of the appellees, such net amount being less than the amount of money advanced by Drexel, Morgan & Co. on the pledge of the bonds and reimbursed to them by Porter.

It has been contended for the appellees, that the appeals by Porter now under consideration are appeals only from the decree of October 9, 1886; that he did not perfect any appeal from the decree of February 16, 1886; that the latter decree was a final decree; that the errors

NO DIFFERENCE
IF CRAWFORD
OWNED ENTIRE
ROAD.

PORTER'S AP-
PEALS—WHAT IS
FINAL DECREE—

which Porter now insists on were errors committed in entering the decree of February 16, 1886 ; and that none of the errors now assigned can be considered by this court, because of the want of any appeal from the decree of February 16, 1886, and because the adjudications now complained of were made by that decree, and not by the decree of October 9, 1886.

It is a sufficient answer to these contentions to say that the decree of February 16, 1886, though a final decree of foreclosure and sale as respected the interest of the mortgagor, and in some other respects, was not a final decree in respect of the matters involved in these appeals. The sixth clause of that decree merely provided that all unpaid, valid claims against the company for right of way, lands, labor, rolling-stock, and material used in the construction and betterment of the railway, were prior, superior, and paramount to the lien of the mortgages and the bonds ; but determined nothing as to who were the holders of such claims, or as to what were their amounts. It designated no persons who could be appellees in any appeal by Porter in respect of such claims, and it provided for a reference to ascertain who were the several claimants under the sixth paragraph of the decree, and what were the amounts due to them severally. The first and only decree from which Porter could appeal, in respect of the claims of these appellees, was the decree of October 9, 1886. The sale made under the decree of February 16, 1886, was not made subject to any claim of any of these appellees. An amendment of that decree, made on 2d of March, 1886, prior to the sale, provided "that the sale of the property hereinbefore ordered shall pass to the purchaser a title thereto, free and discharged of all liens and claims, including the two classes of claims mentioned in the sixth paragraph of said decree." The question of the existence and priority of those claims is, therefore, one open for consideration on these appeals.

The various questions above stated as being raised by the appellees, which are not particularly adverted to, have been fully considered, and it is not regarded as necessary to further remark upon them, or upon the special points made in regard to the particular claims of the appellees, as the views on which we have rested the case seem to us to be controlling on those questions and points.

The decree of the Circuit Court, made October 9th, 1886, is reversed, in so far as it decrees that the claims of the five appellees are prior, superior, and paramount to the lien of the mortgages or deeds of trust mentioned in the decree of February 16th, 1886, and of the bonds secured thereby ; and in so far as it provides for the payment to the appellees, out of the fund in the registry of the court, of the several sums of money specified in the said decree of the 9th of October, 1886 ; and the case is remanded to the Circuit Court, with a direction to take such further proceedings as shall not be inconsistent with this opinion.

Priorities between Contractors Holding Lien on Road and Purchases of Certificates of Bonds.—Thompson v. Memphis, etc., R. Co., note, 24 Am. & Eng. R. R. Cas., 200.

When Mechanics' Liens Have Priority over Mortgage.—Boston v. Chesapeake, etc., R. Co., 12 Am. & Eng., R. R. Cas. 263; Chicago, etc., R. Co. v. Union Rolling Mill R. Co., 16 Ib. 626; Adison *et al.* v. Lewis, 9 Ib. 763.

PORTER

v.

PITTSBURGH BESSEMER STEEL COMPANY.

(122 U. S. Supreme Court Reports, 267).

The decision in this case 120, U. S. 649, (*ante* p. 472), affirmed on application for a rehearing.

The lien law and the redemption law of the State of Indiana considered.

The effect of a redemption under the Revised Statutes of Indiana, § 770 to 776 considered.

Rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of *bona fide* creditors as against any contract between the furnisher of the property and the railroad company, containing a stipulation that the title to the property shall not pass till the property is paid for, and reserving to the vendor the right to remove the property.

Notice of such a contract to a purchaser of bonds covered by such mortgage will not affect his rights if he purchased the bonds from those who were *bona fide* holders of them free from any such notice.

APPEAL from the Circuit Court of the United States for the District of Indiana.

On petition for rehearing.

John S. Cooper, A. C. Harris, W. H. Calkins, and E. W. Tolerton for petition. No brief filed in opposition.

BLATCHFORD, J. The appellees in this case petition for a rehearing. The case was decided at the present term, and is reported in 120 U. S. 649, *ante*, 472. The application for a rehearing covers all the grounds discussed in the opinion of this court, and others which, though not touched upon in the opinion, were fully considered by the court in arriving at its judgment. Upon all the questions covered by the opinion we adhere to our conclusions, and we see nothing in the special grounds taken in regard to the cases of some of the appellees to warrant a different result from that arrived at on the former hearing. It is proper, however, to notice two of the grounds urged in respect to two of the appellees.

The appellee Irwin claims that, by virtue of the lien laws of the State of Indiana, he recovered a judgment for the amount of his claim against the railway company, which became a lien prior to the lien of the mortgages; and that, notwithstanding an attempted redemption by John C. New, the trustee in the mortgages, the lien of the judgment remained good (1) because the redemption laws of the State of Indiana did not apply to the case; and (2) because New did not comply with such laws in regard to redemption in such manner as to destroy the lien of the judgment. It is contended on the part of Irwin that the Indiana statute does not authorize a redemption from a sale of railroad property; that New had no lien on the property sold; and that a redemption redeems simply from the sale, and does not discharge the property from the lien, but only postpones any balance remaining due on the lien to the amount paid for redemption.

The decree of the circuit court of Warren county, made in April, 1884, in the suit to foreclose the lien, brought by Irwin, forecloses the lien for \$11,815.70, as a lien on the line of the railway for a certain distance in Warren county. In June, 1884, execution was issued for a sale, and on the 12th of July, 1884, the property was sold by the sheriff to Irwin for \$500, and a certificate of purchase was issued to Irwin, stating that he would be entitled to a deed of the property in fee-simple in one year from the 12th of July, 1884, if the same should not be redeemed by the defendant, or any other person entitled thereto, paying the purchase-money, with interest at 8 per cent per annum before the expiration of the one year. On the 10th of July, 1885, and within the year, New, as trustee in the mortgages, paid to the clerk of the circuit court \$539.78, in redemption of the property so sold, that being the amount necessary at that date to redeem the property.

It is very clear that, by the sale of the property on the execution, the lien of Irwin upon the property was exhausted, as a lien superior to the mortgages, upon that part of the railway which was covered by such superior lien. The property redeemed by New was the property sold under the decree in favor of Irwin. The redemption by New did not have the effect to restore the lien of the decree upon the property sold and redeemed. The redemption was not made by the judgment debtor, so as to vacate the sale and reinstate the lien for the balance of the judgment which the purchase-money of the sale did not pay. The redemption was made by another and a subsequent lien-holder, who redeemed for his own benefit, and the benefit of those for whom he was trustee, and not for the benefit of Irwin.

This we understand to be the meaning and effect of the statute of Indiana in regard to redemption. Rev. St. Ind. 1881, §§ 770-776. We are not referred to any decisions of the courts of In-

LIEN AND RE-
DEMPTION LAW
OF INDIANA CON-
SIDERED.

diana giving any other construction to these provisions. Section 774 gives the right to redeem to a person having a lien otherwise than by judgment. The statute gives no right to Irwin to redeem from New. The sale of the property on the foreclosure of the mortgage given to New, subsequently to the redemption by New, conveyed the redeemed property to its purchaser on the sale, free and discharged from the lien under the decree in favor of Irwin, on which the sale redeemed from was made and none of the proceeds of the sale on the foreclosure of the mortgages given to New can be applied to pay the unpaid portion of Irwin's decree. If the grading, embankment, and excavation done by Irwin was subject to a sale on execution under his judgment, the redemption law applies to the case, and was complied with by New.

It is claimed on behalf of the Smith Bridge Co. that the contracts between it and the railway company, for the construction of the bridges, provided that the bridges should remain the property of the Smith Bridge Co. EQUITIES OF SMITH BRIDGE Co. — PRIORITY OF MORTGAGES. until the contract price for them should have been fully paid, and that, in default of such payment, the Smith Bridge Co. should have the right to remove the bridges and bridge material; that the mortgages became a lien on the bridges only as the bridges became the rightful and legal property of the railway company; that Porter, before he purchased the bonds, had notice of the equities of the Smith Bridge Co. growing out of their contracts; and that the First National Bank of Chicago had like notice before it acquired any interest in the bonds. The contracts of the Smith Bridge Co. were made in October, 1882, and in July, 1883. The bonds were pledged to Dull and McCormick in January, 1882, and passed from them to Drexel, Morgan and Co., in January, 1883. The bridges became a part of the permanent structure of the railroad, as much so as the rails laid upon the bridges, or upon the railroad outside of the bridges. Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after-acquired property, it is well settled, in the decisions of this court, that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of *bona fide* creditors, as against any contract between the furnisher of the property and the railroad company containing stipulations like those in the contracts in the present case. *Dunham v. R. Co.*, 1 Wall. 254; *Galveston R. v. Cowdrey*, 11 Wall. 459, 480, 482; *U. S. v. New Orleans R.*, 12 Wall. 362, 365; *Dillon v. Barnard*, 21 Wall. 430, 440; *Fosdick v. Schall* 99 U. S. 235, 251.

In regard to the alleged notice to Porter and to the First

National Bank of Chicago, no such notice was given until after Dull and McCormick and Drexel, Morgan & Co. had acquired their rights as *bona fide* holders of the bonds; and Porter, by purchasing the bonds from Drexel, Morgan & Co., acquired all their rights, and those of Dull and McCormick, as shown in the former opinion; and those rights were free in their hands from any notice of any claim of the Smith Bridge Co. *Commissioners v. Bolles*, 94 U. S. 104, 109; *Montclair v. Ramsdell*, 107 U. S. 147.

An error was committed in the former opinion in stating that each of the five appellees knew of the pledge of the bonds to Drexel, Morgan & Co. for the loan, and knew that they were getting a part of the money loaned by Drexel, Morgan & Co. This was not true in regard to all of the five appellees, but was true in regard to only some of them. The error does not affect the result on the merits.

The application for a rehearing is denied.

Equitable Lien for Supplies Furnished.—See note to *Baltimore & O. R. Co. v. Dryden*, 25 Am. & Eng. R. R. Cas. 293; *Heltzell v. Chicago, etc., R. Co.*, 16 Ib. 619; *Chicago, etc., R. Co. v. Union Rolling Mill Co.*, 16 Ib. 626.

Mortgage Covering After-acquired Property does not Displace Lien on such Property.—As a general rule, if the after-acquired property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior in point of time. It only attaches to such interest as the mortgagor acquires. *Williamson v. N. J. South. R. Co.*, 29 N. J. Eq. 277; *Williamson v. N. J. South. R. Co.*, 29 N. J. Eq. 311; *Haven v. Emery*, 33 N. H. 66; *Woods Ry. Law*, 1622. But where a contractor expended money and labor in building a railroad, under an agreement with the company that he should have possession of the road until he is fully paid, does not thereby acquire a priority over an elder valid mortgage. *Dunham v. Cincinnati, etc., R. Co.*, 1 Wall. (U. S.) 254; *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459, was a case where the seller of iron to a railroad was held to acquire no lien prior to an existing mortgage. The decision in this case was based upon the absence of a State lien law. The court said: "By the common law it is an inflexible rule that whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by tenants, which do not affect the question here. The rails put down on the company's road became a part of the road. The road itself was included in the mortgage of the complainants. Pulsford, by allowing his property to go into or become a part of the road, consented to its being covered by the mortgages in question. He acquired no lien which can displace them. In certain States a lien is created by statute in favor of mechanics, called the mechanics' lien, by which a person furnishing materials for work on a building acquires a lien on the property to secure the payment of his claim. But this kind of lien did not exist in Texas in favor of those who supplied materials or money for constructing railroads. We have no hesitation in saying that Pulsford's claim to priority cannot be maintained." In *New Orleans, etc., R. Co. v. Mellen*, 12 Wall. (U. S.) 362, the court, in their opinion, imply that the only exception to the general rule is where the property sought to be covered by the mortgage consists of rails or other material which can become affixed to and a part of the principal thing. They say: "A mortgage intended to cover after-acquired property can only attach

itself to such property in the condition in which it comes into the mortgagors hands. If that property is already subject to mortgages or other liens the general mortgage does not displace them, although they may be junior to it in point of time. It only attaches to such interests as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase-money the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase-money. And in such cases a failure to register the mortgage for purchase-money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of the subsequent, not prior, purchasers and creditors. Had the property sold by the government to the railroad been rails, as in the case of *R. Co. v. Cowdrey*, 11 Wall. 459, or any other material which became affixed to and a part of the principal thing, the result would have been different. But being loose property, susceptible of separate ownership and separate liens, such liens, if binding on the railroad company itself, are unaffected by a prior general mortgage given by the company, and paramount thereto."

The general rule was recognized as applying to cars in *Fosdick v. Schall*, 9 Otto (U. S.) 235. It was there held that where one sold and delivered cars to a railroad company under an agreement that they were to remain his property until paid for. A prior mortgage given by the company upon all the property which it then owned or possessed, or might afterward acquire, did not attach as a lien upon the cars, but they remained the property of the vendor until paid for, and he might reclaim them on default of payment. See, generally, *Miss. etc., R. Co. v. Chicago, etc., R. Co.*, 2 Am. & Eng. R. R. 414; *Hamlin v. European & N. A. R. Co.* and note, 4 Ib. 503-511; *Hamlin v. Gerrard*, 4 Ib. 488; *Little Rock, etc., R. Co. v. Page*, 7 Ib. 36; *Meyer v. Johnson*, 8 Ib. 514; *Branch v. Jesup*, 9 Ib. 558; *Boston, etc., R. Co. v. Coffin* and note, 12 Ib. 375; *Mase v. Nichols*, 17 Ib. 280.

MILWAUKEE AND NORTHERN R. CO.

v.

BROOKS LOCOMOTIVE WORKS.

(121 U. S. Supreme Court Reports, 430.)

On the facts found by the court below, this court holds that the fund in dispute in this case is subject to be applied, by virtue of the garnishee proceedings, to the payment of the judgment debt due to the defendant in error from the plaintiff in error.

ERROR to the Circuit Court of the United States for the eastern district of Wisconsin.

The case is stated in the opinion of the court.

E. Mariner for plaintiff in error.

C. F. Winkler for defendant in error. *James G. Jenkins* with him on the brief.

MATTHEWS, J.—The Brooks Locomotive Works, on November 30, 1875, recovered a judgment against the Milwaukee and Northern R. Co. for the sum of \$15,368.72, with interest and costs, in the

FACTS. Circuit Court of the United States for the eastern district of Wisconsin. Execution thereon having been returned not satisfied, and the judgment being otherwise unpaid and still in force on July 7, 1879, the plaintiff below filed what, under the laws of Wisconsin regulating the practice in such cases, is called an affidavit of garnishment, in which it was alleged that the defendant, the Milwaukee & Northern R. Co., had not property liable to execution sufficient to satisfy the plaintiff's demand, and that the Wisconsin Central R. Co., a corporation of the State of Wisconsin, and Charles L. Colby, Edwin H. Abbot, and John A. Stewart, were indebted to or had property, real or personal, in their possession or under their control, belonging to the defendant in said execution. Summons was accordingly issued, pursuant to said affidavit, against the garnishees, and served on the Wisconsin Central R. Co., C. L. Colby, and Edwin H. Abbot, as well as upon the defendant, the Milwaukee & Northern R. Co. The defendants filed answers, Edwin H. Abbot answering under oath for himself and John A. Stewart, a citizen of New York, jointly. In this answer Stewart and Abbot set out particularly the circumstances under which they allege that they hold the sum of \$28,258.44 as an amount due from them, as trustees for the mortgagebond holders of the Wisconsin Central R. Co., for the use and occupation of the railroad of the Milwaukee & Northern R. Co. while operated by them as such trustees; and, being in doubt as to whether the facts stated cast any liability upon them as garnishees, submit the question of their liability to the court. The other garnishees in their answers deny any indebtedness to the Milwaukee & Northern R. Co.

The cause, having come on for trial upon these issues, was submitted to the court, the intervention of a jury being duly waived. The findings of fact and conclusions of law are as follows:

"First. That on the 30th day of November, 1875, the plaintiff above named duly recovered a judgment in this court against the Milwaukee & Northern R. Co., defendant herein, for the sum of \$15,368.72, damages and costs; that said judgment is still in full force and wholly unpaid and unsatisfied; that there is now due thereon from said defendant, the Milwaukee & Northern R. Co., to said plaintiff, the said sum of \$15,368.72, with interest at the rate of 7 per cent per annum from the 30th day of November, 1875, amounting at this date to the sum of \$23,410.40; and that said judgment was rendered upon certain promissory notes given by said company to the plaintiff upon the sale of an engine furnished for its railroad on the 6th day of September, 1873; that an *alias* execution was duly issued out of

FINDINGS
OF
FACT BY THE
LOWER COURT.

and under the seal of this court to the marshal of the eastern district of Wisconsin upon said judgment on the 7th day of July, 1879, and while the same was in the hands of the said marshal, and wholly unsatisfied, and before the return day thereof, to wit, on the 7th day of July, 1879, this action was commenced, by due service of the garnishee affidavit and summons herein, upon the said defendant and upon the garnishees named in the title of this cause.

“Second. That the Wisconsin Central R. Co. was, at said last-named date, and for many years prior thereto had been, and at all times hereinafter mentioned was, a corporation created by and under the laws of the State of Wisconsin, and owned and operated a railroad from Menasha, in the State of Wisconsin, to Ashland, on lake Superior, in said State; that the defendant, the Milwaukee & Northern R. Co., was during said times a corporation created by and under the laws of the State of Wisconsin, and owned a certain main line of railway extending from the city of Milwaukee, in the State of Wisconsin, to the city of Green Bay, in said State, and a spur line from Hilbert Junction, on said main line to Menasha aforesaid; that the said Wisconsin Central R. Co., on the 1st day of July, 1871, mortgaged its line of railway aforesaid to secure certain bonds therein mentioned, which mortgage was in the usual form of railway mortgages, and authorized the trustees, upon default, to take possession of said railway, and that at all times hereinafter mentioned, the defendants, John A. Stewart and Edwin H. Abbot, were the trustees under said mortgage.

“Third. That the Milwaukee & Northern R. Co., prior to the times hereinafter mentioned, had duly mortgaged its said line of railway to secure its bonds, in the usual form of railway mortgages, with authority upon the part of the trustees in said mortgage named to take possession of said railway upon default in payment of the principal or interest of the bonds thereby secured, and that at the times hereinafter mentioned Jesse Hoyt and A. Warren Greenleaf were the trustees in said mortgage named, a copy of which mortgage is hereto annexed, marked ‘Exhibit A.’

“Fourth. That on November 9, 1873, the Milwaukee & Northern R. Co. leased to the Wisconsin Central R. Co. its line of railway and appurtenances, motive power, and rolling stock, railroad materials, and supplies of every description for the term of 999 years from and after November 30, 1873, a copy of which lease is hereto annexed, marked ‘Exhibit B;’ that by supplemental agreements to said lease, of which ‘Exhibits C and D,’ hereto annexed, are copies, Jesse Hoyt was substituted as trustee in the place of the Wisconsin Marine & Fire Ins. Co. Bank, and that said lease was, on or about January 8, 1878, by said Milwaukee & Northern R. Co., assigned to Jesse Hoyt and A. Warren Greenleaf, trustees under said mortgage, of which the Wisconsin Central R. Co.

had notice, copies of which assignment and notice are hereto annexed, marked 'Exhibits E and F;' that the Wisconsin Central R. Co. entered into possession of said road under said lease, and continued therein until the garnishees herein, Stewart and Abbot, took possession of said railway in January, 1879, and said company paid rent under said lease.

"Fifth. That at the times herein mentioned Jesse Hoyt was the president of the Milwaukee & Northern R. Co., and Angus Smith was the vice-president thereof.

"Sixth. That on January 9, 1875, a foreclosure of the mortgage made by the Milwaukee & Northern R. Co. was commenced in this court by Jesse Hoyt, surviving trustee, against the Milwaukee & Northern R. Co. and the Wisconsin Central R. Co., defendants, but that no receiver was appointed therein until April 28, 1879, on which day the said court, by consent of the parties to said suit, made an order annulling such lease and appointing James C. Spencer receiver, who qualified as such receiver on May 5, 1879, a copy of which order is hereto annexed, marked 'Exhibit G,' and that said trustees had never taken possession of said railroad and property under said mortgage, nor claimed so to do, until the appointment of said receiver.

"Seventh. That on October 12, 1875, one James Ludington recovered a judgment at law, in the circuit court of the State of Wisconsin for the county of Milwaukee, against the Milwaukee & Northern R. Co., and on November 15, 1875, caused an execution to be issued thereon, which was returned *nulla bona* on January 18, 1876, which judgment was rendered upon default and without any appearance of the defendant therein, and the process commencing said action was served only upon Guido Pfister, a director of said company, and upon no other officer or person.

"Eighth. That on November 17, 1875, the said James Ludington filed a bill in equity in said circuit court for the county of Milwaukee, founded upon his said judgment at law, and on December 27, 1875, obtained a decree therein directing the sale of the railroad of the Milwaukee & Northern R. Co. thereunder; that on March 4, 1876, under said decree, the sheriff of the county of Milwaukee sold said railroad to Guido Pfister, and on March 29, 1876, executed a deed thereof to him, but did not make a report of the sale to the court until January 30, 1880, and said sale was confirmed by the court on February 9, 1880, and that the sheriff's deed to Guido Pfister was recorded in the office of the recorder of deeds of the county of Milwaukee on February 26, 1880, but said Pfister never took or claimed possession under said deed.

"Ninth. On January 4, 1879, the defendants, John A. Stewart and Edwin H. Abbott, as trustees under the mortgage of the Wisconsin Central R. Co., said company having theretofore made default under said mortgage, and then being so in default, duly

took possession of said Wisconsin Central R. under the said mortgage, and also took possession of the Milwaukee & Northern R., and thereupon notified the Milwaukee & Northern R. Co. and Jesse Hoyt, trustee of the mortgage of said company, and trustee under its said lease to the Wisconsin Central R. Co., and as assignee of said lease, of the taking of such possession of the Milwaukee & Northern R., and notifying that they declined to assume, affirm, or in any way ratify the lease thereof to the Wisconsin Central R. Co., and notifying that, unless said parties notified should otherwise elect, they would continue to operate said Milwaukee & Northern R. temporarily and for such compensation as that service might fairly be worth, and requesting a personal interview to ascertain their wishes and with a view to a more permanent arrangement, and offering to submit to the parties in interest any proposition which could be jointly recommended with reference to the future possession of said railway, of which notice 'Exhibit H,' hereto annexed, is a copy; that the said Milwaukee & Northern R. Co., or Jesse Hoyt as president or as trustee or as assignee of said lease, did not, nor did either of them, in any way object to the possession of said railroad by said Stewart and Abbot, or give any attention to said notice until the commencement of negotiations in March, 1879, but said Stewart and Abbot continued to use and operate the Milwaukee & Northern R. without further arrangement or agreement, and without any objection by any of the parties to this proceeding, and with the acquiescence of the Wisconsin Central R. Co., but without any assignment of the lease, until May 1, 1879, and until the lease from the receiver as hereinafter found; and said Milwaukee & Northern R. Co. and said Jesse Hoyt, shortly before May 1, 1879, in the presence and with the concurrence of all others interested, including the Wisconsin Central R. Co., had negotiations with them which culminated in an arrangement by which a receiver of the Milwaukee & Northern R. was appointed in the foreclosure suit, as hereinbefore found; that said Stewart and Abbot then entered into a lease with said receiver of said Milwaukee & Northern R. for a certain term commencing on May 1, 1879; that on or about July 23, 1879, after the service of the garnishee affidavit and summons herein, it was arranged and agreed between said Stewart and Abbot, trustees, on the one part, and Jesse Hoyt, as trustee and assignee, upon the other part, that the sum of \$28,258.44 was the amount properly payable by the said Stewart and Abbot as trustees to the party lawfully entitled to receive the same out of the moneys received by said trustees from the operation of the Milwaukee & Northern R. from January 3, 1879, to May 1, 1879, and for the use thereof, which amount was a less sum than would have been coming by the terms of the lease to the Wisconsin Central R., and that thereupon said Stewart

and Abbot paid to Jesse Hoyt, as such trustee and assignee, the said sum of money upon receiving a bond of indemnity executed by Ephraim Mariner, Guido Pfister, and Angus Smith, indemnifying them against this suit by reason of such payment, copies of which agreement of accounting and bond of indemnity are hereto annexed, marked 'Exhibits I and J.'

"Tenth. That on March 8, 1880, an order was made in the foreclosure suit of the mortgage of the Milwaukee & Northern R. Co. for the sale of said railroad, which sale took place on June 5, 1880, and was sold to Ephraim Mariner and Guido Pfister as trustees for the holders of the bonds under said mortgage; that on June 9 the report of said sale was filed, and was confirmed by the court, and that thereafter, on July 3, 1880, the final report of the receiver was filed, asking for a discharge, and said report was confirmed on July 5, 1880.

"Eleventh. That from January 3, 1879, to May 1, 1879, the said Stewart and Abbot were not in possession of or operating said Milwaukee & Northern R. under any lease whatever between them and James C. Spencer as receiver of the Milwaukee & Northern R., as claimed in the answer of the principal defendant herein, nor was the indebtedness of said garnishees for the use and occupation of said railroad during said period owing by them to said James C. Spencer, receiver.

"Conclusions of Law.

"The contention in this case being as to who was entitled to the sum of \$28,258.44, agreed upon as the fair compensation for the use of the Milwaukee & Northern R. from January 3 to May 1, 1879, we find:

"First. That it did not belong to and cannot be rightfully claimed by the receiver appointed in the foreclosure suit of the mortgage on the Milwaukee & Northern R., for the reason that he was not qualified as receiver until a subsequent date, and had never reduced the property to possession, and was only receiver of the mortgaged property.

"Second. That said fund did not belong to the Wisconsin Central R. Co., because such occupation and operation of the road by Stewart and Abbot, trustees, were with its acquiescence, and it is upon record in this cause as denying all indebtedness to the principal defendant herein, and makes no claim to said fund.

"Third. That said fund did not belong to Jesse Hoyt as trustee under said mortgage, because said trustee had not taken possession of said railroad, and was not entitled to the income thereof; that it did not belong to said Jesse Hoyt as trustee under said lease, or as assignee of said lease, because the occupation and operation of said road by Stewart and Abbot, trustees, was not under said lease, but in defiance thereof and in opposition thereto.

"Fourth. That said sum was, at the time of the garnishee proceedings herein, the property of the Milwaukee & Northern R. Co., and was liable to be taken and attached for the debts due by said company; that the plaintiff, by virtue of the garnishee proceedings herein upon Stewart and Abbot, trustees, acquired a lawful claim and lien upon said fund to the extent of the plaintiff's judgment and debt against said company, and that at the time of said garnishment the said John A. Stewart and Edwin H. Abbot had in their hands belonging to the defendant, the Milwaukee & Northern R. Co., and were indebted to and owed said company for the use and occupation by said Stewart and Abbot of the railway of said company from January 3, to May 1, 1879, the sum of \$28,258.44, and that the plaintiff is entitled to judgment against said Stewart and Abbot for the said amount due upon its judgment, to wit, the sum of \$23,410.40; that as to the garnishees, the Wisconsin Central R. Co. and Charles L. Colby, this action should be dismissed.

"Let judgment be entered herein in favor of the plaintiff against John A. Stewart and Edwin H. Abbot for the sum of \$23,410.40, with costs to be taxed.

"Dated May 21, 1883.

"JOHN M. HARLAN, Circuit Justice.

"CHAS. E. DYER, Dist. Judge."

Judgment having been entered for the plaintiff below, separate writs of error have been prosecuted by the Milwaukee & Northern R. Co. and by Stewart and Abbot.

The main contest in the case is between the plaintiff and Jesse Hoyt. If the fund in the hands of the garnishees, Stewart and Abbot, belongs to the Milwaukee & Northern R. Co., the plaintiff is entitled to subject it to the payment of his judgment; otherwise not. Hoyt's claim is, that Stewart and Abbot, as trustees of the Wisconsin Central R. Co., were in possession of the Milwaukee & Northern R. under a lease of that road to the Wisconsin Central R. Co., and are indebted to him, as trustee under that lease and as assignee of the lease, for the rent accruing under it, represented by the fund in their hands. The lease was executed on November 8, 1873, and was for the term of 999 years from that date. It stipulated that the Wisconsin Central R. Co., the lessee, should pay as rent a certain proportion of the gross earnings received from the demised road, instalments of which were to be paid monthly to such trustee as should be, from time to time, jointly selected by the parties, "upon the trust to keep the same until the next instalment of interest is due upon the bonds issued by the first party under their first mortgage, and then to apply the same, or so much thereof as shall be necessary, to the payment of said interest when and as payable, and, if any surplus remain after payment of said

HOYT'S CLAIM—
LEASE OF ROAD
TO WISCONSIN
CENTRAL.

interest, to pay the same to the first party, its successors and assigns, unless said surplus, or some part thereof, is due to the second party for advances, as is hereinafter provided, made to or for the benefit of the first party to pay said interest, and if said surplus, or any part thereof, is so due, then to said second party, as hereinafter provided, so much as is due for said advances and interest."

The Wisconsin Marine & Fire Insurance Company Bank was appointed trustee under the lease. By a supplemental **FURTHER FACTS.** agreement, made June 1, 1875, between the parties, the lease was modified so that the rent reserved for the three years from June 1, 1875, should be 40 per cent of the gross earnings received from the demised premises, and after that so much as was necessary to pay the interest coupons of the Milwaukee & Northern R. Co., not to exceed 40 per cent of the gross earnings. Under that modified lease Jesse Hoyt was appointed temporary trustee in place of the Wisconsin Marine & Fire Insurance Company Bank, for the period of twelve months, which appointment was continued by a further agreement made October 10, 1876.

On January 7, 1878, the Milwaukee & Northern R. Co. made a written assignment to Jesse Hoyt and A. Warren Greenleaf, trustees of the mortgage given to secure its bonds, of the lease of the Milwaukee & Northern R. to the Wisconsin Central R. Co., and of all the covenants therein contained, and of all moneys due or to grow due thereon, upon the same trusts, however, as were expressed in the trust deed executed by the Milwaukee & Northern R. Co. to Hoyt and Greenleaf as security for the first mortgage bonds of said company. On the following day a written notice, signed by Hoyt and Greenleaf, was served upon the Wisconsin Central R. Co. of the fact of such assignment, and directing that company to pay the rent to Jesse Hoyt as theretofore, "such assignment being intended merely as further security for said bonds, and not to disturb the relations of the parties to such lease and modifications." In the meantime, as appears by the sixth finding of facts, Jesse Hoyt, as surviving trustee under the mortgage made by the Milwaukee & Northern R. Co., had commenced proceedings to foreclose the mortgage, the Wisconsin Central R. Co. being a defendant thereto, which proceedings were pending when the garnishees, Stewart and Abbot, as trustees under the mortgage of the Wisconsin Central R. Co., entered into possession of the property of that company, and also took possession of and operated the Milwaukee & Northern R., under the circumstances stated in the ninth finding of facts.

It is now contended, in opposition to the third conclusion of law drawn by the Circuit Court, that upon the facts found the garnishees, Stewart and Abbot, took possession of the Milwaukee & Northern R. under the lease of that road to the Wisconsin

Central R. Co., and became bound thereby to pay rent therefor to Hoyt, as trustee under said lease, or as assignee of said lease. Hoyt is not a party to this proceeding, but it is competent for Stewart and Abbot, as garnishees, to represent his rights in their own defence; for, if in law they are liable to Hoyt, they are not liable to the present defendant in error, and in protecting their own interests it is proper for them to assert the right of Hoyt if they are in law liable to him.

There are, however, two answers to the claim put forward on behalf of Hoyt. If the rent of the Milwaukee & Northern R. is payable to him, either as trustee under the lease or as assignee of the lease, it is not due to him in his own right, but merely for the purposes and upon the trusts expressed either in the lease or in the assignment.

MONEY DUE TO
HOYT AS TRUS-
TEE — PURPOSES
OF THE TRUST.

Those purposes and trusts were to apply the rents to be received by him to the payment of the interest coupons as they became due upon the mortgage bonds of the Milwaukee & Northern R. Co. secured by the mortgage to him; but it nowhere appears in the record that there are any coupons in arrears to which this rent could be applied, and in that event the rent is payable to the Milwaukee & Northern R. Co. as lessor beneficially interested. It in fact appears by the tenth finding, that pending this suit, and before its trial, the Milwaukee & Northern R. was sold, under the proceedings to foreclose the mortgage of which Hoyt was the surviving trustee, to trustees for the holders of the bonds under that mortgage, which sale has been duly confirmed by the court. It does not, therefore, appear but that at the time of the trial of this case all the bonds, with the interest thereon, of the Milwaukee & Northern R. Co. secured by the mortgage of which Hoyt was trustee, had been fully paid and satisfied. If so, Hoyt had no further interest under the lease, either as trustee or assignee, which entitles him to receive the fund in the hands of the garnishees for any purpose.

In the second place, however, it does not follow as a conclusion of law, from the ninth finding of facts, taken in connection with the other facts found, that Stewart and Abbot entered into possession of the railroad of the Milwaukee & Northern R. Co., under the lease of that road to the Wisconsin Central R. Co., and thereby became bound to pay the rent reserved therein. They were not assignees of the term of the Wisconsin Central R. Co. under that lease. They were trustees of the mortgage given by the Wisconsin Central R. Co. to them to secure its bonds, and entered into possession of its railroad by a title antedating the lease to it by the Milwaukee & Northern R. Co. They were not, therefore, bound by the terms of that lease, and were under no obligations to undertake its burdens. They were not bound to take possession of the Mil-

POSITION OF
STEWART AND
ABBOT, AND
THEIR OBLIGA-
TIONS.

waukee & Northern Railway; they did so merely as a matter of convenience to the parties interested in that road, and for their benefit. On doing so they gave explicit notice of the character of their possession. That notice, dated January 11, 1879, was addressed to Jesse Hoyt, as president of the Milwaukee & Northern R. Co., and surviving trustee under its first mortgage and bonds, and trustee under the lease of its railroad to the Wisconsin Central R. Co., and assignee of said lease. In it they say:

**SAME — NOTICE
GIVEN OF THEIR
POSSESSION OF
THE ROAD.**

“We beg to inform you that on the third day of January current we, trustees under and by virtue of the provisions of the first mortgage of the Wisconsin Central R. Co., entered upon and took possession of the property covered by that mortgage, and are now operating the Wisconsin Central R.

“We find that the said company was operating the Milwaukee & Northern R. under a lease. We are not sufficiently informed upon the subject to warrant us in assuming any obligation under that lease. We therefore notify you that we decline to assume, affirm, or in any way ratify that lease. We wish, however, not to interfere in any way with the welfare of that railway, and, unless you otherwise elect, will continue for the present to operate the same temporarily for such compensation as that service may be fairly worth, and, as far as is necessary, but not in excess of its earnings, to repair the same as the Wisconsin Central R. Co. was doing, and also to permit the business of the Wisconsin Central R. Co. to be done as heretofore over that railway. We suggest that you arrange for an early personal interview with us, at which you will make known to us your wishes, and confer with a view to a more permanent arrangement.

“We are ready to submit to the parties in interest any proposition which yourself and we are jointly able to recommend.”

To this notice no answer appears to have been made, and Hoyt's silence under the circumstances may fairly be taken to be an acquiescence in the arrangement proposed by Stewart and Abbot. The proceedings on the part of Hoyt, as trustee under his mortgage, to foreclose that mortgage, were then pending, and the Wisconsin Central R. Co. was a party to that suit. If Hoyt was not willing to accede to the terms proposed by Stewart and Abbot in that notice, in respect to the nature of their occupation and operation of the Milwaukee & Northern R., it was open to him to apply for the appointment of a receiver, as he subsequently did on May 5, 1879, or otherwise to take possession of the Milwaukee & Northern R. as trustee under the mortgage. The legitimate inference from his conduct is that which was drawn by the court below, which held, as matter of law deduced from the facts found, that the garnishees were not in possession of the Milwaukee & Northern R. under the terms

**HOYT'S SUBSE-
QUENT CONDUCT.**

of the lease to the Wisconsin Central R. Co., and for the value of its use and occupation were not bound to account to Hoyt. There was neither privity of contract nor privity of estate between Hoyt and them. Their obligation to pay for that use and occupation was to the company that owned the road.

It is argued by the attorney for the plaintiff in error that there is another alternative by which it may be shown that the garnishees do not owe this fund to the Milwaukee & Northern R. Co.; that is, that Stewart and Abbot entered into possession of the Milwaukee & Northern R. as sub-tenants thereof under the Wisconsin Central R. Co., the lessee, and are bound to pay rent as such to the latter company. But, as we have already seen, Stewart and Abbot entered into possession of the property of the Wisconsin Central R. Co. itself adversely to it, as trustees under its mortgage, by a title antecedent to the date of the lease. Stewart and Abbot in no sense could be considered as accountable to the Wisconsin Central R. Co. as tenants.

STEWART AND
ABBOT NOT AC-
COUNTABLE AS
TENANTS.

We find no error in the judgment of the circuit court, and it is therefore affirmed.

OHIO AND MISSISSIPPI R. Co.

v.

PEOPLE, *ex rel.* ATTORNEY GENERAL.

(*Advance Case, Illinois. March 23, 1887.*)

A petition was filed by the attorney-general on behalf of the people, praying for a peremptory writ of *mandamus* to compel a railroad company to repair and improve a certain unsafe portion of its road and to increase the passenger trains thereon. In its answer the company showed that it had neither the funds nor the means of raising them required to repair the road. In denying the writ, the court *Held* :

1. That the answer showed a conclusive reason why *mandamus* is not a proper remedy in the case, as the writ will not be granted in any case where it is clear it would prove unavailing.

2. That courts, as a general rule, will not interfere with the management of railways in matters relating to the equipment and operation of its road, except where the act sought to be enforced is specific, and the right to its performance in the manner proposed is clear and undoubted.

3. That *mandamus* is not the appropriate remedy where the mandate would require the defendant "to put the road in a good, safe, and suitable condition," as it involves too much discretion on the part of the defendant, in respect to the details of the work, which would lead to difficulty and embarrassment in the enforcement of the order.

4. That there is no authority in the common law for granting a writ of

mandamus to compel a railroad company to increase the number of trains, or to run a particular number of trains over its road daily.

5. That if a railroad company, unable to keep up repairs and pay running expenses, runs a daily passenger train each way over its road, it is as much as the law requires of it.

6. That *quo warranto* and not *mandamus* is the proper remedy.

APPEAL from a judgment of mandate of the circuit court of Sangamon county against the defendant, on relation of the attorney-general, requiring the railway company to repair and improve a certain portion of its road and to increase the passenger trains thereon. Reversed.

The facts are stated in the opinion.

Ramsey, Maxwell & Matthews, Matheny & Matheny, and *Pollard & Werner* for appellant.

George Hunt, attorney-general, and *Palmer & Schutt* and *W. H. Robinson* for the people.

MULKEY, J.—The attorney-general, on the 26th of August, 1886, filed a petition in the name and on the behalf of the people, in the circuit court of Sangamon county, against the Ohio & Mississippi R. Co., praying that the company be compelled by a peremptory writ of *mandamus* to repair and improve generally a certain portion of its road, to be more particularly designated further on, and to increase the passenger trains thereon. The company filed an answer to the petition, to which the court sustained a demurrer, and, the respondent declining to make other or further answer, the court thereupon entered an order awarding the writ as prayed, to reverse which the present appeal is brought. The petition shows that the appellant is the owner, and since 1875 has been operating a railroad for the transportation of freight and passengers from Beardstown, in Cass county, this State, to Shawneetown on the Ohio river, in Gallatin county, which is generally known as the Springfield division of defendant's road. The grounds of complaint, as set forth in the petition, are in substance that the defendant has, for the space of six months last past, permitted its railroad to become out of repair, and remain in an unsafe and dangerous condition for the running of trains of passenger and freight cars thereon, and that it wholly neglects and refuses to keep the same in repair and in a safe condition; that defendant also "neglects and refuses to run trains of cars for the carriage of freight and passengers on and over its road at such times and in such manner" as to accommodate persons living or doing business on the line of the road, and the public generally; that over certain specified portions of the road it runs but one train a day each way, and that merely a mixed train, etc.

It appears from respondent's answer that the line of road to which the petition relates formerly constituted the Illinois South-eastern R., and also the Pana, Springfield & Northwestern R.;

that the companies owning these two roads were consolidated under the name of the Illinois Southeastern R. Co.; that the same was afterwards in 1874, sold and conveyed to John Bloodgood, under a decree of the circuit court of the United States for the southern district of Illinois, whose title the defendant acquired, through a number of mesne conveyances, on the 30th day of January, 1875; that since that time it has continuously owned and operated the said road in connection with its main line of road, which runs east and west between St. Louis and Cincinnati. It is further shown by the answer, and urged by way of defense, that this branch of its road has never paid running expenses, and that its former owner, the Springfield & Illinois Southeastern R. Co. rendered itself wholly insolvent by its attempts to maintain and operate the same, and it is expressly charged that, although the respondent has "diligently and economically managed and operated said line of road, it has not at any time yielded sufficient revenue to defray its operating expenses. Moreover, respondent embodies in its answer an exhibit showing the gross earnings and running expenses, in separate columns, from the 30th of January, 1875, the date of its purchase, down to the 30th of June, 1886, from which it appears the running expenses, including necessary repairs, have exceeded its gross earnings \$411,135.82. It is also shown by the answer that the respondent's main line of road is subject to a present mortgage indebtedness of more than \$10,000,000 which existed at the time of its purchase of the branch road in question. In the face of these undisputed facts, and the express allegation that the company has no funds with which to make the repairs and improvements "required to put the road in proper condition and to operate it as contemplated by this proceeding; and also in face of the further admitted fact that the company has no means by which it can raise such funds—the circuit court entered an order directing that a peremptory writ of *mandamus* issue against the company, commanding it "forthwith to place its . . . railroad in a good, safe, and suitable condition for the running of trains of freight and passenger cars thereon, and to keep and maintain the same in such condition, and to place upon and operate upon and over the entire length of said railroad a sufficient number of freight and passenger cars and trains to accommodate the public, and not less than two passenger trains daily in each direction."

In our judgment there is no theory which finds any sanction in law on which this order and judgment can be sustained. Not because it does not sufficiently appear that the defendant is operating its road in violation of the duties which it owes to the public, for there can be no doubt of the duty of a railway company to keep its road in a reasonable state of repair and in a safe condition; nor is there any doubt

COURTS WILL
NOT GENERALLY
INTERFERE WITH
MANAGEMENT OF
RAILWAYS.

of its duty to so operate it as to afford adequate facilities for the transaction of such business as may be offered it, or at least reasonably be expected. This is equally true with respect to passengers and freight. As to the extent or sufficiency of these facilities, including the number and frequency of trains, that is to be judged of and governed chiefly by the amount of business on the line of the road. The company, however, is given, as it should be, a very large discretion in determining all questions relating to the equipment and operation of its road. Hence courts, as a general rule, will not interfere with the management of railways in these respects, except where the act sought to be enforced is specific, and the right to its performance in the manner proposed is clear and undoubted. Ordinarily the true interests of railway companies, and the strict liabilities imposed upon them as common carriers, are all that is necessary to protect the public against such abuses as are complained of in this case. But, as already stated, these incentives to duty have not attained the desired end or the usual result in the present case. It is an admitted fact upon the record that the road in question is greatly out of repair, and is in an unsafe condition, and the conclusion is fully justified that for the six months last past it has been, and is still being operated

MANDAMUS WILL
NOT BE GRANTED
WHERE REMEDY
WILL BE UNA-
VAILING.

without a proper regard to the safety of life or limb. The answer which the company makes to this, as we have seen, is that it has neither the funds nor the means of raising them, which are required to put the road in a safe condition. Now, while the matter thus set up in the answer no more exonerates the company from the duties which it owes the public than the inability of one to pay his honest debts would relieve him from his legal liabilities to his creditors, yet it does show a conclusive reason why *mandamus* is not a proper remedy in the case. For no principle of law is better settled than that the writ should not be granted in any case where it is clear that it would prove unavailing; as where the act sought to be enforced is from its very nature physically impossible; or where from extrinsic causes it has become so; or where performance, though not absolutely impossible, is from any cause not within the power of the defendant. But whatever the grounds may be, whenever it is apparent that the defendant is unable to perform the act sought to be thus enforced, the writ, as a general rule, will be denied. *People v. Chicago & A. R. Co.*, 55 Ill. 95; *People v. Lieb*, 85 Ill. 484; *People v. Trustees*, 86 Ill. 613; *Cristinan v. Peck*, 90 Ill. 150; *People v. Hatch*, 33 Ill. 9.

It may be that where the defendant has wilfully and wrongfully put it out of his power to perform the required act, he will not be heard to interpose his want of power as a defence to the action; but this limitation upon the general rule as above stated has, in our opinion, no application to the present

MANDATE ASKED
FOR IS TOO GEN-
ERAL.

case. Again, the requiring of the defendant "to put the road in a good, safe, and suitable condition," etc., is so general, and involves so much discretion on the part of the defendant in respect to the details of the work, as to lead to difficulties and embarrassment in the enforcement of the order, and, to say the least of it, to make the remedy of doubtful propriety. Just what would be necessary to place the road in that condition is a matter requiring skill and judgment, and one about which even railroad men might well differ; and hence, from the very nature of the duty enjoined, the defendant could not know of a certainty when the order of the court had been fully complied with. Moreover, in case of an alleged violation of the order, where an honest effort had been made to comply with the mandate of the writ, it would probably involve the investigation of a vast amount of detail, giving rise to conflicting opinions among witnesses, and thus throwing doubt and uncertainty over the whole subject; all of which goes to show the inappropriateness of *mandamus* as a remedy in such a case. *United States v. Commissioners*, 5 Wall. 563; *Rex v. Oxford & Witney Tpke. Roads*, 12 Ad. & El. 427.

It is not pretended that the difficulties here suggested afford a conclusive test, if, indeed, one at all, as to when the action will lie. For it is without doubt true that there are many instances, in cases where the duty is clear and imperative, in which *mandamus* is held to lie, notwithstanding the thing required to be done involves the performance of a multiplicity of acts requiring the exercise of judgment and discretion on the part of the defendant as to such details. Thus, *mandamus* has been held to be a proper remedy to compel a railway company to so grade its tracks as to make the crossings practically convenient and useful. *Chicago, etc., R. Co. v. People*, 56 Ill. 365. Also to compel a company to so construct its road across a stream as not to interfere with navigation. *State v. North Eastern R. Co.*, 9 Rich. L. 247. In any event, however, this feature of the case should be taken into consideration in determining whether, in view of all the facts shown, the people have made out such a case as to entitle them to the relief prayed. It is conceded to the fullest extent that *mandamus* is an appropriate remedy to compel a railway company to perform any specific duty which it owes to the public as owner or operator of its road. Thus, it may be compelled to replace a part of its track which it has wrongfully taken up (*King v. Severn, etc., R. Co.*, 2 Barn. & Ald. 644); also to operate its road as a continuous line (*Union Pac. R. Co. v. Hall*, 91 U. S. 343); to compel it to build a bridge (*People v. Boston & A. R. Co.*, 70 N. Y. 569); to compel it run daily trains (*Re Brunswick, etc., R. Co.*, 1 P. & B. 667); and also, where there is a statute expressly requiring it, to compel a company to stop at least two of its trains each day at a particular station (*Commonwealth v. Eastern R. Co.*, 103 Mass. 254.)

Many of these cases, however, it will be found, are controlled by special statutory provisions. It is believed, however, no case can be found which, in the absence of a statutory requirement, has gone to the length of holding that a railway company may be compelled by *mandamus* to increase the number of trains on its road, or to run daily a particular number of trains over its road; and we are satisfied there is no common-law authority for making such an order. Of course, where the charter of the company expressly requires that not less than a given number of trains shall be run daily, the company may be compelled by *mandamus* to perform this, like any other specified duty enjoined by its charter or by other statutory provision. But, even if this might be done on mere common-law principles, we are clearly of the opinion that the order in this case requiring the defendant to run daily two passenger trains each way over its road was wholly unwarranted by the circumstances. If the travel and other business on the road, with one passenger train each way daily, have failed to keep the road in repair and pay running expenses, as is clearly shown to be the fact, it is difficult to perceive upon what theory the company in its embarrassed condition can be required to incur the additional expense of two extra passenger trains. A company that runs a daily passenger train each way over a road which cannot, with proper management, be made to keep up repairs and pay running expenses, certainly does fully as much as the law requires of it, so far as passenger trains are concerned. If it be claimed, as it seems to be, that the road's failure to be self-sustaining is the result of the company's misconduct and breach of duty, such matter, if intended to be relied on, should have been set up by replication. Instead of this, the defendant demurred to the answer, thereby admitting the truth of the answer as to all matters of fact well pleaded.

To summarize what, perhaps, already sufficiently appears, we are of opinion that, upon the admitted facts of this case, the company is clearly guilty of a violation of its duty in not keeping its road in a proper state of repair and a safe condition; but that, under the circumstances, and for the reasons heretofore stated, *mandamus* is not the proper remedy for the enforcement of such duty. If, as seems to be the case, the defendant is wholly unable to discharge the duties it owes to the public, and which the law has imposed upon it, a proceeding in the nature of a *quo warranto* is the proper remedy, and not *mandamus*. Should the company by this means be deprived of its franchises, if the road can be made self-sustaining and pay something on the capital invested, doubtless another company would organize for the purpose of buying and operating it, and the advantages of the road under a proper management would be thus secured to the people.

NO COMMON-LAW
AUTHORITY TO
COMPEL A RAIL-
ROAD COMPANY
TO INCREASE THE
NUMBER OF ITS
TRAINS.

QUO WARRANTO
THE PROPER
REMEDY.

On the other hand, if the line of road is not capable under any management of being made self-sustaining, it simply shows there is no demand or necessity for the road, and the sooner, therefore, the State revokes the franchise the better. A business that will not pay ought not to be followed, as it adds nothing to the wealth of those pursuing it, or of the State.

The judgment of the circuit court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

What Duties a Railroad may be Compelled to Perform by Mandamus.—

See *People v. N. Y. Cent. R. Co.*, 9 Am. & Eng. R. R. Cas. 1; *State, ex rel., v. Patterson, etc.*, R. Co., 9 Ib. 134; 10 Ib. 334; *State v. Missouri Pac. R. Co.*, and note, 20 Ib. 45-60; *State v. Kansas City, etc.*, R. Co., and note, 16 Ib. 297-300; *State v. Southern Kansas R. Co.*, 22 Ib. 198; *State v. Republican Valley R. Co.*, 22 Ib. 500-506; *State v. Delaware, L. & W. R. Co.*, 23 Ib. 470; *Pittsburgh, etc.*, R. Co. v. Commonwealth, note, 24 Ib. 271; *People v. Chicago, W. D. R. Co.*, 25 Ib. 258; *State v. Missouri Pac. R. Co.*, note 25 Ib. 261; *People v. Rome, W. & O. R. Co.*, 28 Ib. 35; note to *Ex parte Koehler*, 29 Ib. 54; note, 29 Am. & Eng. R. R. Cas. 485.

In *Indianapolis, etc.*, R. Co. v. State, 37 Ind. 489, it was held that *mandamus* will lie to compel a railroad company to so build its track, level and grade the streets, as to make the use of the streets and the crossings of the track convenient for the public.

In *King v. Severn, etc.*, R. Co., 2 Barn. Ald. 646, it was held that where a railroad company wrongfully took up its track, *mandamus* would lie to compel it to relay the same.

In *Railroad Commissioners v. Portland, etc.*, R. Co., 63 Me. 269, it was held that *mandamus* will lie to compel a railroad company to perform the public duties required of it by its charter, and to compel it to erect and maintain a depot.

In *People v. Boston, etc.*, R. Co., 70 N. Y. 569, it was held that *mandamus* would lie to compel a railroad company to build a bridge.

In *Chicago, etc.*, R. Co. v. People, 56 Ill. 365, it was held that *mandamus* is a proper remedy to compel a railroad company to deliver grain to a particular elevator. The right to relief by *mandamus* in such case is based upon the obligation of the railroad company as common carrier, and the want of any other adequate remedy at law.

In *Chicago, etc.*, R. Co. v. Crane, 113 U. S. 424, it was held that where a railroad company had abandoned a portion of its line which it was its duty to maintain, *mandamus* would lie to compel the maintenance and operation of such portion of its road.

In *State v. Hartford, etc.*, R. Co., 29 Conn. 538, a railroad company had abandoned part of its track, and refused to run passenger trains on it.

In proceedings by the attorney-general asking a *mandamus* to compel the railroad company to run trains over such portion of the road for the accommodation of the public, the court observed: "We hardly know what principles of law are thought to be involved in the case. The respondents certainly were bound to make their road (if at all) within the time prescribed in the charter, and, having made it, to put it into use—every material part of it—and keep it in use until discharged by the legislature. And this continuous duty is in no manner inconsistent with the power in the company (which has been so much dwelt upon in the argument) to regulate and control the manner of using the road by wholesome rules and by-laws. These, we admit, are necessary and allowable, but then they must be such as are

really promotive of the original design of the charter, and not such as tend to defeat that design."

In *People v. New York Central, etc.*, R. Co., 28 Hun (N. Y.), 543, the court said: "The writ of *mandamus* has been awarded to compel a company to operate its road as one continuous line (*Union P. R. Co. v. Hall*, 91 U. S. 343). To compel the running of passenger trains to the terminus of the road (*State v. Hartford & N. H. R. Co.*, 29 Conn. 538); to compel the company to make fences and cattle-guards (*People v. Rochester & State Line R. Co.*, 14 Hun. 373; s. c., 76 N. Y. 294); to compel it to build a bridge (*People v. Boston & A. R. Co.*, 70 N. Y. 569); to compel it to construct its road across streams so as not to interfere with navigation (*State v. North Eastern R. Co.*, 9 Rich. L. 247); to compel it to run daily trains (*Re New Brunswick, etc.*, R., 1 P. & B. 667); to compel the delivery of grain at a particular elevator (*Chicago & N. W. R. Co. v. People*, 56 Ill. 365); to compel the completion of its road (*Farmers' Loan & Trust Co. v. Henning*, 17 Am. L. Reg. N. S. 266); to compel the grading of its track so as to make crossings convenient and useful (*People v. Duchess & C. R. Co.*, 58 N. Y. 152; *New York Cent. & H. R. R. Co. v. People*, 12 Hun, 195; s. c., 74 N. Y. 302; *Indianapolis & C. R. Co. v. State*, 37 Ind. 489); to compel the reestablishment of an abandoned station (*State v. New Haven & N. Co.*, 37 Conn. 154); to compel the replacment of a track taken up in violation of its charter (*Rex v. Severn & W. R. Co.*, 2 Barn. & Ald. 646); to prevent the abandonment of a road once completed (*Talcott v. Pine Grove*, 1 Flip. 145); and to compel a company to exercise its franchise (*People v. Albany & V. R. Co.*, 24 N. Y. 261). These are all expressed or implied obligations arising from the charters of the railroad companies, but not more so than the duty to carry freight and passengers. That duty is, indeed, the *ultima ratio* of their existence—the great and sole public good for the attainment and accomplishment of which all the other powers and duties are given or imposed. It is strangely illogical to assert that the State, through the courts, may compel the performance of every step necessary to bring a corporation into a condition of readiness to do the very thing for which it is created, but it is then powerless to complete the doing of the thing itself.

"We cannot bring our minds to entertain a doubt that a railroad corporation is compellable by *mandamus* to exercise its duties as a carrier of freight and passengers."

See generally, *State v. North Eastern R. Co.*, 9 Rich. L. (S. Car.) 247; *Union Pacific R. Co. v. Hall*, 91 U. S. 543; *New York Central, etc., R. Co. v. People*, 12 Hun (N. Y.), 195; *People v. Duchess, etc., R. Co.*, 58 N. Y. 152. In *People v. Rochester, etc., R. Co.*, 14 Hun (N. Y.), 371, *mandamus* against a railroad company was allowed to compel it to construct and maintain fences and cattle-guards as required by law.

See this whole subject discussed in Morawetz on Corporations (2d Ed.), § 1182.

TOMKINSON

v.

SOUTHEASTERN R. Co.

(Law Reports, 35 Ch. D. 675.)

At a meeting of the stockholders or proprietors of a railway company a resolution was passed authorizing the directors to subscribe a sum out of the company's funds towards the erection of the Imperial Institute. *Held*, that the proposed subscription was not prevented from being *ultra vires* by the fact that the establishment of the Institute might benefit the company by causing an increase of passenger traffic over their line.

THIS was a motion by the plaintiff, a holder of £500 deferred ordinary stock of the Southeastern R. Co., for an injunction to restrain the company and its directors, officers, servants, and agents, until the trial of the action or further order, from subscribing, advancing, or paying out of the moneys of the company, the sum of £1,000, or any other sum, by way of donation, or otherwise, to or for the purposes of the Imperial Institute, or to any person or persons on behalf of the Institute.

At a meeting of the stockholders or "proprietors" of the Southeastern R., held on the 5th of March, 1887, to consider a circular issued by the executive council of the Imperial Institute to the Southeastern and other railway companies, inviting them to subscribe to the funds of the Institute, the following resolution was passed, on the motion of the chairman of the company: "That the directors be authorized, either by way of donation from the company or by an appeal to the proprietors, as they may be advised, to subscribe the sum of £1,000 to the Imperial Institute: Provided, that any shareholder who declines to be a party to any such donation shall have his proportion returned to him with his next dividend warrant."

The resolution was carried by 10,229 votes, representing £1,209,035 ordinary stock of the company, against 175 votes, representing stock to the amount of £13,500.

The plaintiff was not himself present at the meeting, but, having read a report of the proceedings, he, on the 11th of March, wrote to the secretary of the company protesting against the proposed application of any of the company's funds toward the Imperial Institute, and threatening legal proceedings. In his reply the secretary pointed out that the directors were accustomed to act in obedience to the orders of their shareholders, and not otherwise, and that, having regard to the amount of the plaintiff's hold-

ing, his interest in the contribution of £1,000 would be represented by about 13*d*.

After some further correspondence the plaintiff commenced this action, and now moved as above stated.

In an affidavit in opposition to the motion, the company's general manager stated that, in recommending the proprietors to contribute to the funds of the Institute, the directors desired to further its establishment in the belief that a great number of visitors would thereby be drawn from the districts served by their railway and their traffic largely increased; and that, inasmuch as the previous exhibitions at South Kensington had, by the issue of through tickets from their system of railways, increased the traffic revenue of the company by several thousands of pounds, the directors believed that the establishment of the Institute at South Kensington would lead to a similar result. The affidavit further stated that railway companies in general had been accustomed to contribute to the funds of objects likely to encourage traffic upon their lines, such as race-meetings and regattas, and also to hospitals and other public institutions which might benefit their employes.

A. Young for the plaintiff.

Sir *R. Webster*, A.G., *C. T. Mitchell*, and *Worsley Taylor* for the defendants.

KAY, J.—I have no doubt that it is the duty of the court to grant an injunction in this case.

The question, as the attorney-general said, is whether the act proposed to be done is within the powers of the railway company, or outside its powers. If it is outside its powers, it is now perfectly settled that any one shareholder may come to this court and say, "This company is going to do an act which is beyond its powers; stop it;" and the court thereupon has no discretion in the matter.

Now, what is proposed to be done here is this: The chairman of the railway company, at a meeting of the company, proposed this resolution: "That the directors be authorized, either by way of donation from the company or by an appeal to the proprietors, as they may be advised"—the resolution thus proposing two alternative modes—"to subscribe the sum of £1,000 to the Imperial Institute." I pause there. The Imperial Institute has no more connection with this railway company than the present exhibition of pictures at Burlington House, or the Grosvenor Gallery, or Madame Tussaud's or any other Institution in London that can be mentioned. The only ground for the suggestion that this company has the right to apply its funds, which it has been allowed to raise for specific purposes, to this purpose, is, that the Imperial Institute, if it succeeds, will very probably greatly increase the traffic of this company. If that is a

PROBABLE IN-
CREASE OF TRAF-
FIC NOT A GOOD
REASON.

good reason, then, as I pointed out during the argument, any possible kind of exhibition which, by being established in London, would probably increase the traffic of a railway company by inducing people to come up to see it, would be an object to which a railway company might subscribe part of its funds. I never heard of such a rule, and, as far as I understand the law, that clearly would not be a proper application of the moneys of a railway company. I cannot distinguish this case from that at all, though, of course, I do not mean to disparage the enormous importance of the Imperial Institute. It may be established for the highest possible objects of interest to this country; but still the only reason given to me why this railway company thinks it right to spend part of its funds in subscribing to it is this, that it will probably greatly increase the traffic of the company by inducing many people to travel up to visit this Institute. I cannot accept that as a reason for a moment. Therefore, as at present advised, it seems to me that this is *ultra vires*.

Before I go further I will read the rest of the resolution: "Provided, that any shareholder who declines to be a party to any such donation shall have his proportion returned to him with his next dividend warrant." That means this: "We, the directors, propose to spend money which ought to be divided among you, the shareholders, in paying a subscription to this Institute; if you do not like it, we admit you have a right to object, and your proportion will be returned to you with your next dividend warrant." This shareholder says, "I do not want my money spent in that way;" and he is right, if it is beyond the powers of the company, in saying that the money shall not be spent in that way. Moreover, his objection is not confined to his own share. It is said that his share of the subscription would be comparatively trivial; but if the subscription is *ultra vires*, the company ought not to spend a farthing of their funds on the Institute. His objection is to the whole expenditure.

PROVIDING FOR
OBJECTING
SHAREHOLDERS.

Now the cases which have been cited really seem to me to be authorities directly against this proposed application of the company's funds.

I first take *Taunton v. Royal Insurance Co.*, 2 H. & M. 135, 140. That was a case where an insurance company were proposing to pay certain risks which they could not legally be compelled to pay; and the evidence, as I remember the case, was that that had been for a long time past treated as within the discretion of managers of insurance companies. Certain cases sometimes arise in which, when the loss has occurred, the policy-moneys cannot legally be demanded from the insurance company; but it has been the general practice among insurance companies—I believe the universal practice, as proved in the case cited—to consider cases of that kind, and for a company to treat

AUTHORITIES
EXAMINED.

itself as not limited strictly by its legal obligations in such cases; but where the matter is *bona fide*, in order to impress the people who deal with the company with an idea of its liberality, the company has been accustomed to pay on such policies, although not legally liable. The court in the case to which I have referred (which I have always considered carried this doctrine to the very verge to which it ought to go) recognized that well-established practice, and would not restrain that particular company from doing what other companies, or the directors of other companies, in similar cases always did. I noticed, as the attorney-general read Vice-Chancellor Wood's judgment, these words: "It is said that the payment is a mere gratuity. Let it be so called, it does not follow that it is beyond the power of the company if to give such gratuities be the generally received method of conducting such a business."

Then take the next case cited, *Hampson v. Price's Patent Candle Co.*, 45 L. J. (Ch.) 437. There the directors of the defendant company gave out of their undivided profits certain extra wages to their workmen. That was held not to be *ultra vires*. It amounted to no more than this—that the company had workmen with whom they were entirely satisfied, and they wished to give them such encouragement as a good master continually does give to his good servants, by presenting them with something beyond their wages to encourage them in diligent and faithful service. It certainly would have been an extravagant thing to say that the directors of a trading company, who had to hire and pay servants, in giving to their servants a benefit of that kind, were acting beyond their powers.

Then take the next case, *Hutton v. West Cork R. Co.*, 23 Ch. D. 654. That really was a case in which only the *dicta* supported the decision in *Hampson v. Price's Patent Candle Co.*, 45 L. J. (Ch.) 437, but it showed the limits of that decision very plainly indeed. The West Cork R. Co. was being wound up, and on the liquidator proposing to give gratuities to servants whose services were coming to an end, it was thought right to restrain him from doing so.

I do not think I need refer particularly to *Pickering v. Stephenson*, Law Rep. 14 Eq. 322. There what was done was decided to be *ultra vires*, but seeing that the amount which the plaintiff would be entitled to recover was exceedingly minute, the court would not make an order for payment back to him of the moneys improperly expended.

Does any one of those cases touch the present? Certainly, I should be the last judge on the bench to extend the meaning of those cases. It is absolutely necessary to keep incorporated or joint-stock companies within the limits of their powers. That is a rule which has been recognized over

and over again. To say that because the authorities which have been referred to have held that the acts there done were within the limits of the powers of the company in each case, therefore it follows that any expenditure which may indirectly conduce to the benefit of the company is *intra vires*, seems to me extravagant.

I know of no authority whatever for saying that the payment of £1000 of the funds of this company as a subscription to the Imperial Institute would be within the powers of a railway company. I might stop there, because, this being an application for an interlocutory injunction, I am bound, if I felt difficulty upon the question, to restrain the matter until the trial of the action; but my present opinion is entirely against the validity of this act.

Therefore, it seems to me I am clearly bound to restrain, until the trial of this action, the expenditure of this money out of the company's funds.

An alternative is suggested, as I pointed out, in the resolution inviting the individual proprietors to sanction this payment out of their funds, because it says "either by way of donation from the company or by an appeal to the proprietors, as they may be advised." An appeal to the proprietors means an appeal to subscribe £1000, which they are invited to give to the Imperial Institute. To that no kind of objection could be made; but this case has been argued on the footing that the alternative adopted by the directors has been, not to take that step, but to apply the moneys of the company. That, it seems to me, the court is bound to restrain them from doing, and I therefore grant an injunction in the terms of the notice of motion, the plaintiff giving the usual undertaking in damages.

Authority of Railway Company to Subscribe Funds to Public Object.—There are two American cases in point with the principal case. In *State Board of Agriculture v. Citizens' St. R.*, 47 Ind. 407, it was held that a subscription made by a railway company to secure the permanent location of a State fair upon its line, was binding upon it, the court saying: "Although there may be a defect of power in a corporation to make a contract, if a contract made by it is not in violation of the terms of the charter of the corporation, or of any statute prohibiting it, and the corporation has by its promise induced a party relying upon such promise, and in execution of the contract, to expend money, and perform his part of the contract, the corporation is liable on the contract."

Directly opposed to this case is a Massachusetts decision, *Davis v. Old Colony R. Co.*, 131 Mass. 258; s. c., 3 Am. & Eng. R. R. Cas. 543. It is there held that a contract by a railroad corporation to pay or guarantee a certain part of the expenses of a "World's peace jubilee and international musical festival" is neither a necessary nor appropriate means of carrying on its business, and is *ultra vires*, and cannot bind it by reason of benefit to be derived from possible increase of passengers over its road. The opinion is by Justice Gray, and refers to all the more important English and American decisions. Wood, in his work on Railway Law, approves of the doctrine of the Massachusetts court. 3 Wood's Ry. Law, 485.

MEMPHIS GRAIN AND ELEVATOR CO.

v.

MEMPHIS AND CHARLESTON R. CO.

(*Advance Case, Tennessee. May 3, 1887.*)

A railroad corporation was empowered by its charter "to do all lawful acts properly incident to a corporation, and necessary and proper to the transaction of the business for which it is incorporated." Its charter also declared that it should "possess such additional powers as may be convenient for the due and successful execution of the powers granted in this charter." As an inducement for a subscription to its stock by an elevator corporation, the railroad company attempted to guarantee an 8 per cent dividend on the elevator stock. *Held, ultra vires and void.*

APPEAL from chancery court, Shelby county.

Estes & Warinner for complainant.

Poston & Poston for defendant.

TURNER, C. J.—The charter of the Memphis & Charleston R. Co. gives power "to do all lawful acts properly incident to a corporation, and necessary and proper to the transaction of the business for which it is incorporated," and "that said company shall possess such additional powers as may be convenient for the due and successful execution of the powers granted in this charter." To induce a subscription of stock to the latter, the Memphis & Charleston R. Co. entered into an agreement with complainant company that "these subscriptions are made with the understanding that the Memphis & Charleston R. Co. will guaranty the subscribers shall receive not less than 8 per cent dividends per annum on the stock paid in;" the board of directors resolving "that this company [Memphis & Charleston R.] will and doth guaranty that the subscribers to the capital stock of the Memphis Grain & Package Elevator Co. shall receive not less than 8 per cent dividends per annum on the stocks paid in respectively by them. . . ." This bill is filed to enforce the contract.

It is clear that by the terms of the charter the railroad company is authorized to employ all appliances necessary to the promotion of the legitimate objects and purposes of the corporation. It may as properly build or rent elevators for purposes of loading and unloading as it may hire labor, buy or rent trucks, wagons, etc. To do such things falls strictly within the powers granted. But does the charter confer a power to go beyond the employment of the

necessary means, and guaranty a profit to persons, firms, or corporations engaged in their peculiar business?

In *Davis v. R. Co.*, 131 Mass. 259, Chief Justice Gray, after saying the reported cases on the subject are so numerous that he will refer to comparatively few of them, adds: "A ^{CONTRACT OF} corporation has power to do such business only as it is ^{GUARANTY VOID.} authorized by its act of incorporation to do, and no other. It is not held out by the government, nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it make a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on application of a stockholder, will restrain the corporation from carrying out the contract; and a court of common law will sustain no action on the contract against the corporation. "Every person who enters into a contract with a corporation is bound, at his peril, to take notice of the legal limits of its capacity."

This is sound in reason and principle, and is the rule in this State. The case before us falls strictly within it. The obligation to guaranty a profit cannot be construed to mean a hiring of labor or machinery for railroad purposes. While it may, by implication, be understood as an agreement to employ the elevator to do necessary work for the railroad company, it goes beyond, and assumes a — of a large per cent. There is nothing in the obligation which expressly binds the corporation to use the elevator, nor is it important to its owners whether it does use it. The guaranty of 8 per cent, if good at all, is good without a use of the elevator. The corporation is only concerned in its own success, and authorized only to do such things as are necessary to the transaction of its business—the business for which it was incorporated. In no part of the grant of power is that of guarantying the success of another institution, person, or corporation to be found in either expression or implication. Decree affirmed.

Agreement of one Company to Guarantee Dividends of Another.—*Flagg v. Manhattan R. Co.*, 4 Am. & Eng. R. R. Cas. 140.

Railroad may Guarantee to Steamboat Line that Earnings will Amount to Certain Sum.—*Green Bay, etc., R. Co. v. Union Steamboat Co.*, 13 Ib. 658.

DELAWARE RIVER AND LANCASTER R. Co.

v.

ROWLAND.

(*Advance Case, Pennsylvania. May 30, 1887.*)

Proof that a railroad company has abandoned the construction of its line is sufficient to defeat an action to recover unpaid subscriptions to its stock; and it is for the jury to determine whether under the evidence, the company has abandoned the construction. In this case, *held*, that the evidence was properly submitted.

JANUARY term, 1887, No. 132, E. D., before Mercur, Ch. J., Gordon, Trunkey, Sterrett, and Clark, J.J.

Error to the common pleas of Chester county, to review a judgment on a verdict for the defendant in an action of *assumpsit*. Affirmed.

The facts as they appeared at the trial before Futhey, P. J., were stated in his charge to the jury, which was as follows:

This is an action brought by the Delaware River & Lancaster R. Co. against Samuel N. Rowland, to recover a balance upon a subscription to its capital stock.

It appears by the evidence that on March 24, 1868, an act of assembly was passed incorporating the Delaware River & Lancaster R. Co., for the purpose of constructing a railroad "from a point on the Delaware river, at or near Point Pleasant in Bucks county, touching Phoenixville, to a point at or near Lancaster city, in Lancaster county; . . . provided, that said company shall commence said road within two years from the passage of this act."

A supplement to that act was passed February 10, 1870, granting an extension of three years for the commencement of the road, making a period of five years, and covering the space of time from the date of the passage of the original act, to March 24, 1873.

Commissioners were appointed under the first act of assembly, for the purpose of obtaining subscriptions to the stock of the company, and performing such other duties as were necessary in the commencement of operations.

On June 18, 1868, prior to the organization of the company, the defendant subscribed for four shares of its capital stock.

On September 15, 1871, letters patent were issued to the company, and on October 12, 1871, the company was formally organized by the election of proper officers.

In 1872 another act of assembly was passed, which authorized the company "to locate, build, construct, and operate the said railroad by the most available route from a point on the Delaware river, at or near Point Pleasant, in Bucks county, to a point at or near Lancaster city, in Lancaster county, and to connect with any railroad now constructed, or that may at any time be constructed, at either end or at any intermediate point on the line or route thereof."

The act of assembly incorporating the company directed that the road should touch Phoenixville, authorizing its construction from the Delaware river, at or near Point Pleasant, in Bucks county, touching Phoenixville, to a point at or near Lancaster city.

The act of 1872, however, did not require the company to construct the road "touching Phoenixville," but authorized its construction by the most available route from the Delaware river, at or near Point Pleasant, to a point at or near Lancaster city, connecting with other roads, etc.

In 1882, fourteen years after the passage of the original act of incorporation, and eleven years after letters patent had been issued, a call was made by the company for the payment of the subscriptions to the stock. Prior to that time there had been no call made; but at that time, by a resolution of the board of directors, a call was made for the payment of the subscriptions in ten installments of \$5 per share, the par value being \$50, extending from February 10, 1883, to November 15, 1883.

On September 10, 1883, the defendant paid \$60 on account of his subscription of four shares, being three instalments of \$20 each. This payment was made about two months before the last instalment fell due, and consequently after the date of the preceding eight instalments.

[The defendant now declines to pay the balance of his subscription, on the ground that the company does not contemplate the construction of the road, and that in fact the project has been abandoned. This is the question for your determination, and if you find that the construction of the road has been abandoned, the defendant is entitled to your verdict.]

The charter was obtained in 1872, and, under the original act of assembly and its supplement taken together, five years was named as the period in which the construction of the road was to be commenced. In the winter of 1872-73 some grading was done on the property of Christian Mast, in the neighborhood of Springfield, under a verbal contract with George W. Crane, who testified that he worked there for about three months, grading a section of about 600 feet, when he was directed to cease the work; and since that time no further work in the way of grading has been done by the company.

It appears that this work was done before the expiration of the five years prescribed by the act of assembly for the commencement of the road. In considering the allegation of the defendant that the road has been abandoned, you will determine whether the work done by Mr. Crane, under the verbal contract, was a *bona fide* effort on the part of the company to construct the road, or whether the work was simply for the purpose of complying with the provisions of the charter, limiting the time of its commencement, and was not afterward followed by any other work.

In 1875, the company made a contract with Bush & Co., a firm in New York; but there has been no evidence given as to its terms, and it does not appear that any work was done in pursuance therewith.

On August 29, 1882, a contract was made with Layman, Walker & Co. of New York, about ten years after the first work was done on the road by Mr. Crane, under his verbal contract; but up to that time no other effort had been made toward its construction. Bush & Co. were to have been united in the contract with Layman, Walker & Co.; but they subsequently declined doing so, on the ground that they were strangers to them, and consequently the contract was made simply with Layman, Walker & Co.

It appears that Layman, Walker & Co. made some preparations for the carrying out of this contract, in the way of contracting for rails and locomotives, and the horses and carts were sent to a certain section of the road, but nothing visible to the eye was done toward the graduation of the road. The company afterward became dissatisfied with the action of these contractors and the contract was finally cancelled, since which time no further contract has been made by the company with any parties for the construction of the road, and, so far as practical results are concerned, the position of affairs remains to-day the same as it was when George W. Crane ceased the limited amount of grading he accomplished in 1873, in the vicinity of Springfield.

It was during the existence of the contract with Layman, Walker & Co. that the partial payment of his subscription to the stock of the company was made by the defendant, the date of the contract being August 29, 1882, and that of the payment September 10, 1883. The date of the rescission of the contract has not been given, but the evidence seems to indicate that it was after this payment by the defendant.

On March 1, 1873, the board of directors placed a mortgage of \$2,000,000 upon the road; and bonds were issued amounting to \$1,000,000. The plaintiff contends that, owing to the failure of Jay Cooke, and the unsettled condition of the monetary affairs of the country at that time, the bonds were not negotiated, but placed in the hands of the trustee in New York, where they remained until 1882, a period of nine years, when they were hunted up, and

found in the garret of the trustee, who delivered them to the company.

On November 1, 1882, a new mortgage of \$2,000,000 was placed on the road, and \$1,000,000 of bonds issued, but never negotiated. It was in this year that the contract was made with Layman, Walker & Co. and that engineers were sent on the road for the purpose of revising the location between Phoenixville and Lancaster city. The line was first surveyed between these points in 1872-73; and from that time to 1882, no other survey or revision of the line appears to have been made.

It also appears that the company obtained some releases, or agreements to release, about the time the engineers were surveying the line in 1872-73. The officer of the company having the matter in charge followed them along the road, and when they announced its definite location, he called on the land owners in reference to obtaining the right of way and arranging the settlement of the damages, wherever it was practicable.

[I have thus briefly referred to the testimony bearing upon the question of the abandonment of the road, and whether the plaintiff intends in good faith to place it in operation. If you find that it does not intend to construct the road, as contemplated by the act of assembly, and has abandoned the enterprise, it is not entitled to your verdict.

The defendants subscribed to the stock of the company for the purpose of enabling it to construct the road; and if the project has been abandoned, there is no reason why he should be compelled to pay the balance of the subscription.] If, however, it is the purpose of the company to construct the road, and the project has not been abandoned, then the plaintiff is entitled to your verdict for the balance of the unpaid subscription, with the penalty added by the act of assembly for the non-payment of subscriptions.

The assignments of error specified certain rulings upon the evidence and the portions of the charge inclosed in brackets.

E. D. North, D. Smith Talbot and William B. Waddell for plaintiff in error.

Thomas and William Butler and Wm. Aug. Atlee for defendant in error.

PER CURIAM.—We have examined the authorities cited by the counsel for the plaintiff and carefully considered their able and zealous arguments, yet we are not able to find any error in the record which demands a reversal of this judgment. The evidence of abandonment of the road was sufficient to submit that fact to the jury.

Judgment affirmed.

Abandonment of Work before Completion is Sufficient Ground for Enjoining Action upon Subscription to Stock.—*Montgomery S. R. Co. v. Mathews*, 24 Am. & Eng. R. R. Cas. 9.

Abandonment of Road as a Defence to Action to Recover Subscriptions.—The mere fact that work upon the construction of a road has been suspended, or that it was not commenced or completed within the time required in the charter, affords no ground for a defence at law against an action to recover a subscription. *Miller v. Pittsburgh, etc., R. Co.*, 40 Pa. St. 237; *Taggart v. Western Maryland R. Co.*, 24 Md. 563; *Smith v. Gowar*, 2 Duv. (Ky.) 17. And where a railroad company has suspended labor thereon, and the officers of the company are striving to collect the money due the company and apply it to some other purpose foreign to that for which it was subscribed, it forms ample ground for restraining the company or its officers from misapplying the funds, although not a ground for inhibiting its collection. *Illinois Grand Trunk R. Co. v. Cook*, 29 Ill. 237. And in *Hardy v. Merriweather*, 14 Ind. 203, it was held that the abandonment of the construction of a railroad does not of itself constitute a defence to a suit to recover debts due the company chartered to accomplish such construction. Abandonment of the prosecution of the undertaking does not release the company from debts contracted while its prosecution was continued; and while the corporate organization remains dues to the corporation may be collected in the corporate name for the payment of debts. After the corporate existence has ceased, creditors may still pursue its assets by proceedings against the debtors and stockholders. See also *Morgan County v. Thomas*, 76 Ill. 120.

“Parties have sometimes interposed as a defence to actions to recover their subscriptions the fact that the corporation has become insolvent, or that the enterprise has been finally abandoned; but neither ground affords any defence to an action at law whatever, except in the latter instance, where the subscriber can show that no funds are needed to pay the corporate debts. The subscriber, if he has any remedy in such cases, which will always depend upon the peculiar facts of each case, must seek it in a court of equity.” 1 Woods Ry. Law, 109, 110.

In *Manheim Plank-road Co. v. Arndt*, 31 Pa. St. 317, it is held to be involved in the nature of a subscription to the stock of a company to construct a road from one place to another that the termini are part of the contract; and if the company procure an act of the assembly altering the termini of the road the subscriptions are no longer binding. See also *McCully v. Pittsburgh, etc., R. Co.*, 32 Pa. St. 25.

HAZELTINE *et al.*

v.

BELFAST AND MOOSEHEAD LAKE R. CO. *et al.*

(*Advance Case, Maine. June 6, 1887.*)

Holders of preferred stock in the Belfast & Moosehead Lake R. Co. are entitled to a dividend from net profits each year during which they are earned, but not, under the terms of their subscriptions, to cumulative dividends. The arrearages of one year are not payable out of the earnings of

subsequent years. The inquiry is whether earned during the particular year for which they are demanded.

Whilst the prospective wants and liabilities of a railroad corporation may be taken into account in ascertaining whether net profits have been earned from which the corporation can afford to declare a dividend, directors are not justified in refusing to declare a dividend to preferred stockholders from earnings on hand, merely because the corporation cannot pay all of its funded mortgage indebtedness at maturity if dividends be paid; other conditions are to be considered.

The court will compel a corporation to declare and pay dividends on preferred stock when the question becomes one more of right to be determined by the law than of discretion to be determined by the directors, and the directors refuse to perform their legal duty.

The defendant corporation owes nothing but a bonded mortgage debt of \$150,000, to mature in 1890; the common stock is \$380,400, and the preferred \$267,700; the road cost \$1,050,000; the earnings of the road have paid off an indebtedness of \$251,900, which entered into its construction, the reduction commencing in 1871 and terminating in 1885, leaving in the latter year \$22,412.32 cash assets on hand; the expenses of the corporation are trifling beyond the payment of \$9,000 annually as interest on the bonded debt; the road is under lease until 1921, at an assured rent of \$36,000 per year, the lessee running the road at its own risk and expense, and keeping it in repair and paying all taxes thereon; the corporation has the ability, upon the strength of the lease, or on the value of the road, to renew a portion of the debt, or all of it, upon advantageous terms; and the preference shareholders have been for many years deprived of dividends to enable the corporation to consummate the payment of its debts. *Held*, under these and other less important facts, that the preferred stock is entitled to a full annual dividend from the balance of earnings remaining on hand at the expiration of the year 1885.

BILL in equity. Bill sustained.

The facts are fully stated in the opinion.

Wm. H. Fogler for plaintiffs.

Drummond & Drummond for defendants.

PETERS, Ch. J.—The facts of this case and most of its questions were before the court in the case of *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445; s. c., 23 Am. & Eng. R. R. Cas. 736. The preferred stockholders of the company are now complain-FACTS.ants against the company and its directors, seeking to obtain through a court of equity dividends on their stock.

On March 20, 1886, when this bill was brought, the following facts existed: The road was, and since May 10, 1871, had been, leased to the Maine Central R. Co., the lease to run until May 10, 1921, the lessee to operate the road during the intervening period at its own risk and expense, to keep it in repair and pay all taxes thereon, and pay a rent of \$36,000 per year.

The common stock amounts to \$380,400, and the preferred to \$267,700, all paid in, amounting at par value to \$648,100. The road cost \$1,050,000. The means expended for its construction, besides stock paid in, consisted of a bonded debt of \$150,000, a

floating debt of \$150,000, and an indebtedness to the city of Belfast, the principal stockholder, of \$101,900 for borrowed money. The bonded debt is secured by mortgage on the road, the principal of which will mature May 15, 1890, having existed in the same form since May 15, 1870, the interest thereon having been regularly paid semi-annually. It is the only debt existing against the company, nor is it pretended that any other can arise against the company from this time to the end of the lease in 1921. The company's expenses are trifling, being only such as are necessary to keep up a formal corporate organization. The floating debt had been wholly extinguished, the borrowed money paid, and there were in the treasury \$22,412.32 of cash assets, all from rents received under the lease, at the date of this complaint.

At that time the directors had laid aside out of money on hand \$19,900, which, with future rents, might be available as a reserve fund wherewith to pay the bonded debt when it matures in 1890. But before this appropriation, which can easily be recalled, the complainants had used due diligence in the way of demands, notices, motions, and other movements to obtain from the directors a recognition of their equitable right to a dividend.

Three questions arise on the facts: 1. Are the preferred stockholders entitled to annual dividends, if earned? 2. At the date of the bill had dividends been earned? 3. Is this a case authorizing the court to require the directors to declare a dividend?

While all of these questions were hardly before the court in the former case, to be directly adjudicated, still they were necessarily involved in it, and we then considered them carefully, hoping the parties would be satisfied with the results which were foreshadowed, without proceeding with further litigation. We then indicated that we were of the opinion that the preferred stockholders would be entitled to dividends after the floating debt became paid; and, after considering the questions anew, we at this time see nothing to require us to change that opinion.

There can be no possible doubt that the obligation of the company to the privileged shares rests on by-law 18, and that the by-law establishes the terms of a contract between company and stockholders. We have already so decided.

The by-law runs thus: "Dividends on the preferred stock shall first be made semi-annually from the net earnings of the road, not exceeding 6 per cent per annum, after which dividend, if there shall remain a surplus, a dividend shall be made on the non-preferred stock up to a like per cent per annum; and should a surplus then remain of net earnings, after both of said dividends, in any one year, the same shall be divided *pro rata* on all the stock."

The construction which we gave to this contract in the previous case was certainly very liberal toward the holders of the common

RIGHT OF PRE-
FERRED SHARE-
HOLDERS TO
DIVIDENDS.

stock; and all the doubts were weighed in their behalf, in the decision that the preferred stock was non-cumulative. Had the by-law merely provided that the preferred shares should be entitled to a dividend of 6 per cent annually when earned, the arrearages of one year would have been payable out of the earnings of subsequent years, and there would have been no occasion for the present controversy between the two classes of stockholders. There is no question among the authorities on this point. Jones, R. R. § 620; Morawetz, Corp. 2d ed. § 458; Cook & Stockh. § 272. The latter author, in a note to § 269 of his work, published in 1887, cites *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, as inconsistent with the general rule, but states the ground for the variance, that, inasmuch as the by-law implies that the entire net earnings of each year should be paid out in dividends, a deficiency of preferred dividend in any year could not be made up in subsequent years.

The next question is whether the money on hand shall be regarded as net earnings out of which a preferred dividend should be paid; and the question has been discussed, secondarily, as to what extent future earnings under the lease will come under the same head. This point depends usually on several considerations; is a relative question—not always susceptible of clear demonstration—and a matter, to a considerable extent, of good judgment in conducting the company's business, and good faith in upholding its contracts on the part of directors.

WHETHER DIVI-
DEND HAS BEEN
EARNED.

All the cases in which an inquiry has arisen concerning the propriety or legality of paying preferred dividends, where the contract is to pay as often as annually if there are annual earnings, concur in this, that the inquiry must be whether net profits have been earned in the particular year at the expiration of which dividends are demanded. The future wants and liabilities of the company may, no doubt, be taken into the calculation to a certain extent, as will be more fully explained hereafter.

We think that under any of the approved definitions of net earnings, meaning such net earnings as are applicable to dividends, the complainants make out a case.

Certainly, in a literal view, there must be net earnings each year till 1890, if not up to the end of the lease. For the bills payable are \$9,000 per annum—a trifle, only, more—and bills receivable are \$36,000, leaving \$27,000 balance on hand each year. The preferred dividends would be \$16,062 per annum, leaving about \$11,000 in the treasury annually. This balance cannot now possibly be paid on any debt of the company. It is only claimed by the respondents that in the future it may be so used.

In *People v. Niagara County Supervisors*, 4 Hill, 20, it is said: "Profits generally mean the gain which comes in or is received from any business or investment where both receipts and payments

are to be taken into account." The case of *Dent v. London Tramways Co.* L. R. 16 Ch. Div. 344, strongly resembles the present case on this point. There, as here, the preference dividends were dependent upon the profits of the particular year only. Jessel, M. R., says: "That means this, that the preferred shareholders only take a dividend if there are profits of the year sufficient to pay their dividend. They are coadventurers for each particular year, and can only look to the profits of that year. If they are lost for that year, they are lost forever. Profits for the year mean the surplus receipts after paying expenses and restoring the capital to the position it was in on the 1st day of January of that year." *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq., decided in 1882, presents questions similar to the present, and announces the rule that the preferred stockholders' "rights are to be governed and regulated each year by the pecuniary condition of the corporation at the close of the year."

In *Morawetz on Corporations*, 2d ed. § 459, an approved work, the doctrine is stated: "The directors of a corporation have a discretionary power to withhold profits from the holders of common shares in order to accumulate a surplus, etc., but it is the duty of the directors to pay the preferred shareholders their promised or guaranteed dividends whenever the company has acquired funds which may rightfully be used for the payment of dividends. This rule applies with peculiar strictness where the preferred shareholders are entitled to receive their dividends annually out of profits earned during the current year only, and a deficit in any year does not become payable out of subsequent profits."

But apply to the question the definition of net profits which would be regarded as the most liberal to the company, or the holders of the common stock; allow that there must be net profits such as should be applied to dividends; and that funds may be kept on hand sufficient to make reasonable provision for both the present and future necessities of the company. A very much quoted definition, as applicable to railroad corporations, is that formulated by Mr. Justice Blatchford in *St. John v. Erie R. Co.*, 10 Blatchf. 271: "Net earnings are, properly, the gross receipts less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains—that is, out of net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders to go toward dividends, which, in that way, are paid out of the net earnings." This definition was substantially repeated in *Warren v. King*, 108 U. S. 389, Mr. Justice Blatchford, upon another bench, delivering the opinion, and asserting that, "while the rights of a preferred stockholder are not to be superior to the rights of creditors, they are nevertheless enforceable against the company according to

the terms of the contract made by them." We refer to the views to which we committed ourselves upon this branch of the case in 77 Me. 452, *supra*.

It will be noticed that the definition of net profits, in the case of railroad corporations, which are generally more heavily in debt than other kinds of business corporations, calls for the payment of interest on the company debt, but not necessarily for payment of any portion of the principal. At this point the parties come to a closer issue, and really to the turning point of the controversy. And that is, whether the bonded debt of \$150,000, due in 1890, must be first wholly paid before any declaration of dividends. The respondents so contend. The complainants contend that, in ascertaining net profits, a portion only of the earnings should be reserved for the payment of the debt, and that the debt, or some portion of it, when it comes due, should be extended in some form.

The authorities, on the subject of ascertaining what are the annual net profits or earnings of a railroad corporation, perhaps without exception, make a distinction between the payment of its floating debt and the payment of its permanent or bonded debt—between ordinary and extraordinary indebtedness. It is not indispensable, however, that the company be free from the pressure of floating debt before it may lawfully pay dividends even to holders of its non-preferred stock. It may even, under some circumstances, borrow money to pay dividends. Morawetz, Corp. 2d ed. § 438, and cases.

In many cases there is difficulty in ascertaining what the actual condition of a company may be. None exists here. There could not well be an instance of less complicated affairs. The business of the company is guaranteed, its amount of income fixed, its expenses are nominal, and its freedom from all the liabilities and risks usually incident to the management of a railroad is assured for the next thirty-three years.

In every sense this last debt of \$150,000 is a permanent debt. It is a bonded mortgage, and interest-bearing debt. The lease secures it many times over. The road itself is an absolute security for it, and undeniably for much more. It is a permanent debt for another reason. It entered into the construction of the road and is represented in its permanent property. A distinction between expenses for construction and ordinary expenses is maintained in the leading cases on this subject. The argument is that capital paid in and capital borrowed unitedly produced the earnings, and that a proportionate share of the earnings should be accorded to each. 77 Me. 453, *supra*.

In that view the bonded debt earns but \$9000 per annum of the \$36,000 earned in all.

It will be readily seen that there are special reasons for deeming the complainants' claim equitable. They have been required to

remain in waiting for dividends for many years, in order that a large amount of the company's indebtedness, say \$250,000, should be first paid—quite an exacting construction against them being required to produce such result. The company or its common shareholders would have suffered no injustice had the debt to the city of Belfast been placed in a permanent funded form. Another thing, before spoken of, which favors the complainants, is that by our former opinion their dividends were held to be non-cumulative, and if lost now are forever lost. Still another thing may be of importance enough to be taken into account, and that is that the corporation is paying 6 per cent interest on its bonds, and receives about one third interest on the sums which it proposes to keep on hand.

The respondents go further than to deny that net profits have been or will be earned; they contend that they should not be divided even if they have been earned. Of course, all the net earnings of an indebted company should not always be devoted to dividends. We think a company should have a right to base its calculations upon a final payment of its debts at some time. But steps in that direction are not to be untimely or oppressive to other interests, and should be such as not to unreasonably interfere with the expectations or interests of stockholders, and such as will not prevent a reasonable performance of all other obligations which have been assumed by the company. The more practical question is as to how far the earnings shall be reserved and how far divided. But it comes round to the primary question, which is, Have net profits been earned, such as are reasonably applicable to dividends? The argument of the learned counsel for the respondents seems to proceed upon the idea that the complainants have a prior right to receive dividends only whenever they have been actually declared, but that the company has the right to refuse to declare dividends, whether they have been earned or not. Such is not the letter or spirit of the contract entered into. The promise of the company was, that dividends semi-annually from net earnings "shall be made."

But when the present mortgage debt of \$150,000 was established it was to be paid in twenty years, and shall it not be paid at the end of that time, asks counsel? It may have been supposed that twenty years would be long enough for the debt to run without a renewal. But if it was even supposed that the debt could be conveniently paid at maturity without renewal, was it not calculated by the parties that dividends would be in the mean time distributed to the preferred stockholders? The result only proves a miscalculation by the company of its ability to literally perform its obligations. Is it an excuse for not declaring dividends out of net earnings, provided there are net earnings, merely that a company cannot pay an entire bonded debt at maturity without creating a

new debt or borrowing again? Is it not reasonable to require the company to keep all its obligations, when they can easily do so? If the company had no means or credit which would enable them to place a new obligation on the market, there would be force in the position. But no such inability is or possibly can be pretended. Can it be said that a railroad company makes no net profits in a year in which it gains \$36,000 and has only \$9000 to pay out, because it owes \$150,000, payable in four years, abundantly secured upon its property, when the company has a perfect credit and abundant means to enable it to replace the old with a new loan on advantageous terms? Does a merchant who carries on business partly on borrowed capital, earn no profits in a year at the end of which, besides retaining his capital, he has received \$27,000 more than all he has paid out, simply because he owes a debt for his borrowed capital which he has abundant ability to pay, but not without further borrowing? Says Morawetz (Corp. § 439): "In ascertaining whether a company has a surplus which may be divided among the shareholders, permanent improvements made by means of borrowed money may often be valued as counterbalancing the liability of the company for the money used to construct them."

Two cases are relied on for the respondents, neither of which appears to us as having any tendency to support their general positions. One is *Karnes v. Rochester & G. V. R. Co.*, 4 Abb. Pr. N. S. 107. That case shows that two sets of railroad directors were chosen, and a controversy was going on between them as to which was the legitimate board. Pending that litigation a common shareholder—there was no preferred stock—brought a bill to have all the moneyed assets of the corporation distributed among the stockholders. There were \$36,000 in government bonds on hand; the debt was \$70,000, due in seventeen years; the annual expenses were about \$10,000; and the bill, which was demurred to, did not allege whether there was any annual balance of profits or not. The court, among other grounds of decision, said that no breach of any obligation on the part of the company to the stockholders, nor any omission of duty, was alleged; that the acts of directors should not be interfered with by courts except to prevent injustice; that the corporation could make no dividends, and the directors were not a party to the bill; that there was nothing to indicate that the money on hand was not needful for the security of the creditors of the company; that it was not even alleged that the directors had refused to make a dividend, nor stated that one in justice ought to be made; and the bill was dismissed.

The other case is *Nickals v. New York, L. E. & W. R. Co.*, lately determined in the Supreme Court of the United States, reported in 15 Fed. Rep. 575. The case was first decided in the circuit court, 21 Blatchf. 177, where it was held that the company could not, against the interests of preferred stockholders, divert a

large quantity of funds from them to other uses of the company. The decree was reversed in the upper court; not for any difference between the two tribunals as to the law of the case, as stated by the judge below, but upon a difference of opinion in making an application of the law to the facts. The points of the case are correctly represented by the headnotes which are as follows: "The holder of preferred stock is not entitled absolutely to a dividend, even if there be 'net earnings' from which such dividend might be paid. The directors may use the 'net earnings' for the improvement of the road, where such improvement is shown to be imperatively necessary to the preservation of the corporate property, and the continuance of the corporate business." The court were deeply impressed with the uncontradicted testimony of the president of the company that, "but for using the funds in question in that case, the company could not have paid its fixed charges, but would have again gone into bankruptcy, and the entire interest of the stockholders been destroyed." That is unquestionable doctrine. Preferred stockholders are not to be protected to the extent of endangering the rights of creditors, or wrecking or crippling the enterprise of the road. Clark, Stockh. § 271; Culver v. Reno Real Estate Co., 91 Pa. 367.

The condition of the railroad above alluded to, the Erie system, illustrates the fallacy of the claim that all the earnings of a railroad corporation should be withheld from stockholders until its debts are paid. That company has a capital of over \$77,000,000 of common and preferred stock; and an indebtedness exceeding \$100,000,000, secured and unsecured. The court need not have troubled itself over the difficulties presented in that case, if it had had the courage to assume that the preferred stockholders were not entitled to dividends until the \$100,000,000 of debt were paid. There is hardly a railroad company in the world that has not a funded debt. Such a rule would work an injustice amounting to cruelty in many cases. Rev. Stat. chap. 47, § 100, provides that savings banks may invest their deposits in the stocks of any dividend-paying railroad in New England. How would the rule contended for work with savings-bank deposits invested in Maine Central R. stock, a company having \$3,600,000 stock and \$11,000,000 of indebtedness; or in the Boston & Maine, with a debt of \$7,000,000; or in the Boston & Albany, with a debt of \$10,000,000; or, if we look out of New England, in the Chicago, Burlington & Quincy R. Co., one of the most reputable companies in our country, having more than \$80,000,000 of funded indebtedness? What would annuities and life estates be practically worth to the holders of them in railroad companies, under a rule which allowed no dividends until all debts are paid. The history of railroad enterprises teaches us that the old liabilities of companies are well nigh habitually paid by the creation of new ones, the

general design being to lessen the liabilities which are represented in the construction by gradual processes.

The last point which the case presents is whether the court can interfere in behalf of the complainants. We think it can and should. The directors refuse to perform a duty. They ignore a contract. They are chosen by the holders of the common stock, who are the majority, and are hostile to the interest of the complainants. We asserted the right of the court

AUTHORITY TO
REQUIRE DIREC-
TORS TO DE-
CLARE DIVIDEND.

in the former case, and there cited authorities in support of it. Says Morawetz (Corp. § 280): "Where certain shareholders are entitled to privileges which do not belong to the other members of the company, the court will provide a remedy for an infringement of these privileges by the other shareholders or the company's agents." See Cook, Stock & Stockh. § 541, and cases cited. Says Wheeler, J., in *Nickals v. New York, L. E. & W. R. Co.*, *supra*: "When it comes to the question of using the profits which would go to one set of stockholders for the benefit of another set, a more rigid rule should be upheld. The question becomes more one of right to be determined by the law, than one of policy to be determined by the discretion of the directors." When the resolution of directors makes an alteration in the priorities and payments provided in the memorandum of association, it is beyond their power, and may be interfered with by the court. *Ashbury v. Watson*, L. R. 30 Ch. Div. 376. Even an action at law was allowed on a contract to make a dividend of earnings. *Bates v. Androscoggin & K. R. Co.*, 49 Me. 491.

But has the court the power, asks the learned counsel, to prevent a company paying its debt when it comes due? Not at all. On the contrary, the court would compel the company to pay its debts to the letter. It will also exercise its power in a legitimate case to require the company to keep its other obligations legal or equitable. While the company does not owe a debt to the preferred shareholders, it does owe them an obligation, founded upon a contract which is as sacred as any other contract. If the company had not sufficient means or credit with which to pay its debts without applying upon them the funds in question, the funds should be so used. But no creditor makes opposition to complainant's claim, nor have they any occasion to. The creditors must be protected, and so must the different classes of stockholders, according to their respective rights. If the preferred stock is in the way of an earlier enjoyment of dividends by the holders of the common stock than otherwise would have been it is an impediment of the company's own creation. The contract to pay dividends on preferred stock was upon the sole condition that net earnings are possessed by the company. New conditions cannot be imposed by the company alone. Good faith forbids it.

Finally, what shall the decree be? The complainants, admitting

that the mortgage debt should be paid within some reasonable time, which must from necessity be somewhat arbitrarily fixed, and adopting the scheme suggested by the court in the former case, ask that a decree be passed allowing dividends for the present and the future for such an amount semi-annually as will not deprive the company of an opportunity of extinguishing its debt within the life of the lease, if it desires to, and of paying dividends to the preferred stockholders during the same period. That would require a calculation which a master, and not the court, should make, and we are inclined to the view that such an extensive decree may not be expedient, all things considered, at the present juncture. The future action of the company may make such a comprehensive proceeding avoidable.

The limited and more direct inquiry is whether on January 1, 1886, the company should have declared a dividend on the preferred stock; requiring therefor the payment of \$16,062. We think, as between itself and that class of stockholders, it was possessed of net earnings enough, which by its agreement it had pledged for that purpose. It had \$22,412.32 in its treasury; it received \$18,000 in addition on May 10, 1886; it had nothing to pay until a half year's interest, \$4500, became due on May 15, 1886.

Bill sustained with costs. Decree according to the opinion.

Walton, Danforth, Virgin, Libbey, and Foster, JJ., concurred.

Dividends on Preferred Stock.—See *Nickals v. New York, etc., R. Co.*, 13 Am. & Eng. R. R. Cas. 139; *Chaffee v. Rutland R. Co.* and note, 16 Ib. 408-435; *Dent v. London T. Co.*, 1 Ib. 592; *State v. Cheraw, etc., R. Co.*, 9 Ib. 681; *Elkins v. Camden & A. R. Co.* and note, 9 Ib. 689-646; *Belfast & M. L. R. Co. v. Belfast*, and note, 23 Ib. 736-743.

MORRIS

v.

NEW YORK CENT. AND H. R. R. Co.

(*Advance Case, New York. October 4, 1887.*)

Plaintiff, while a passenger on one of defendant's railroad trains, was injured by a wringer falling upon him from the rack above the seat. The wringer appeared in the rack simply as a parcel, wrapped in brown paper, and there was nothing extraordinary about the parcel or its position, and nothing to attract particular attention to it. In an action to recover damages for the injury, *held*, that the denial of a motion for nonsuit was error. Danforth, J., dissenting.

APPEAL from general term, supreme court, third department.

Action to recover for injuries received from a wringer falling upon plaintiff from the rack above the seat in a passenger car. The wringer appeared in the rack simply as a parcel, wrapped in brown paper. Plaintiff testified that the ends of the parcel were open, but he could not discern what it was. The conductor and brakeman did not know of the presence of a wringer in the rack until after the accident.

Matthew Hale for appellant.

Andrew Hamilton for respondent.

PECKHAM, J.—The learned judge, in submitting this case to the jury, instructed them that there was no evidence upon which they could find that the car or the rack therein was insufficient, and that there was no negligence upon the part of the de-² INSTRUCTIONS TO THE JURY.. fendant in receiving the clothes-wringer in the car; nor was there evidence that any employee of defendant saw the wringer put in the rack, or knew of its being so put in, and that the defendants were not guilty of negligence in permitting the wringer to be put in the rack. In this we think he was entirely right. He, however, did submit one question for the determination of the jury, and in the following language: "The wringer which has been described to you was in this rack. Was it an article which was insecure to be so placed, and was it calculated to endanger the safety of the passenger who took his seat in the vicinity of this wringer? The second question, and perhaps the one which is the more important, is whether the wringer was so wrapped and enveloped as to conceal the real character of the wringer from the ordinary careful inspection of the employee of the railroad. The railroad corporation, as I regard the law, would not be liable even although an article not strictly baggage should be placed in one of these receptacles, provided the corporation had no notice of the character of the objectionable article, and providing also, that there was nothing in the appearance of the parcel to indicate, upon proper inspection by the employees, the character of the article concealed in the package. . . . Was it so bound and so enveloped as that the employee, in the fair and honest discharge of his duties, exercising a degree of vigilance which he ought under the circumstances in your judgment to have exercised—was it so exposed that by passing through in the discharge of his duties there, that he should have observed what it was or not? . . . It is a simple question for you to determine, upon this branch of the case, whether this wringer was so enveloped as not to be obvious and discernible to the employees of the road in the honest and faithful discharge of their duty, on that occasion, which the law required at their hands. If it was obvious, they should have observed; if it was not, then there was nothing which gave to them

constructive notice of the existence in that wrapper of an article which was dangerous, and which they were bound to remove."

We think there was not sufficient evidence to warrant the submission of the question of defendant's negligence to the jury. It is undisputed that the parcel was to some extent wrapped up in paper, and, even if only covered in the manner described by the plaintiff, its apparent character, both as to bulk and weight, was not such as reasonably to call the attention of the train hands to it, or, if noticed by them, it was not so apparently placed in a dangerous position as to demand from them an order for its removal from the rack. In looking out for dangers arising from causes such as this, we do not think that carriers of passengers are to be held to the exercise of the highest care which human vigilance can give. That measure of care has been spoken of as due from them in the actual transportation of the passenger, and in regard to the results naturally to be apprehended from a failure to furnish safe road-beds, proper machinery, perfect cars or coaches, and things of that nature. But in regard to a danger of this kind a carrier of passengers is, we think, held to a less strict measure of vigilance. Reasonable care (to be measured by the circumstances surrounding each case) to prevent accidents of this nature is all that is demanded, and we do not think there was evidence in this case of any such lack of care on the part of the officers of the train.

From the evidence, it seems to be quite clear that there was nothing extraordinary about the parcel, or its position in the rack, and nothing to attract particular attention to it; and so the failure of the train hands to notice it, or, if noticed, to order its removal, was not negligence. We think the motion for a nonsuit on this ground should have been granted, and for this reason the judgment should be reversed, and a new trial ordered: costs to abide the event.

(All concur, except DANFORTH, J., dissenting, and RAPALLO, J., absent.)

LOUISVILLE, N. O. AND T. R. Co.

v.

THOMPSON.

(Advance Case, Mississippi. April 4, 1887.)

Where a railroad company, at a station where a passenger train and a freight train pass each other, stops the freight train on a side track, across which passengers alighting from the passenger train are compelled to go in order to reach the depot, leaving, as it has been its custom to do, an opening between the cars of the freight train for them to pass through, this is an invitation to them to use such opening; and where, without warning or signal, the engine of the freight train is suddenly and rapidly backed against the cars, so that a passenger is caught between them while attempting to go through the open space, and severely injured, the railroad company will be liable if the passenger acted, under the circumstances, as a reasonable and prudent man would do.

A verdict of \$15,000 damages for a broken thigh, fractured pelvis, and other permanent injuries, awarded a passenger injured by the negligence of a railroad company, *held* not excessive.

APPEAL from circuit court, Franklin county.

Thompson sued the railroad company for damages sustained by him by reason of injuries, permanent in their character, inflicted, as he claims, through the negligence of the railroad company. The jury returned a verdict for him, and assessed his damages at \$15,000, and the court below refused to disturb it, and the company appeals. The evidence tended to show, and warranted the jury in finding, the following state of facts:

At Knoxville, a station on the road where the injury occurred, was a side track between the main track and the passenger depot. It was then, and had been for months, the passing point for the south-bound passenger train and the north-bound through freight train. It was the custom for the freight train to take the side track in advance of the passenger train, and, when it did so, it obstructed passage from the passenger depot to the point on the main track where the passenger train usually stopped. To avoid that obstruction it was customary for the freight train to make an opening just opposite the depot by uncoupling its cars, and separating them wide enough to admit of passage by footmen to and from the cars. The employes of the company, the mail and express agents, passengers, and the public generally, usually passed and repassed through the opening. It was the custom of the freight train to couple up, and move out after the passenger train left.

On the day Thompson was injured, he attempted to pass through

the opening to the passenger train, when, without any signal, by ringing the bell or sounding the whistle, or any other warning calculated to give notice to those on the side of the train from which Thompson was approaching, that the opening was about to be closed, the engine backed with force and rapidity, and caught him between the draw-heads of the cars, breaking his thigh, crushing the pelvic bone, and injuring him for life.

The side track was down grade north, the direction the freight train was proceeding—so much so that the cars, with brakes off, would roll down with great speed. To the north of the depot there was a public crossing that had been opened; the engine, with a number of freight cars attached, standing north of the crossing, and the remainder of the train south of it, standing solidly, with the exception of the opening at the depot, through which plaintiff attempted to pass. The passenger train had just arrived—was still standing on the main track—when plaintiff was injured, and did not leave until after plaintiff had been removed from the place of injury. The object of plaintiff's visit to the train was to see the agent in reference to the shipment of freight south, and to mail a letter, and to see a party on business on the opposite side of the track from the point which he started to cross it.

Under this state of facts it is claimed by appellant that the company is not guilty of negligence, and that, if it was, the plaintiff, by his own negligence in attempting the passage, contributed to his own injury, and is debarred from any recovery by reason of it.

In his argument to the jury, one of Thompson's counsel stated "that the railroad company was bound, and was under an obligation to the general public, when the passenger train was at the depot, to open the freight train so that any one might pass through, whether from a whim or on business;" the counsel telling the jury that this was the law. Counsel for railroad interrupted Thompson's counsel, and asked the court to correct him, and require him to refrain from stating to the jury other propositions of law than those announced by the instructions of the court given in the case, which the court refused to do.

W. A. Percy for appellant.

H. Cassedy and *J. F. Sessions* for respondent.

ARNOLD, J.—The instructions given and refused, and the rulings of his honor, the circuit judge, throughout the trial display accurate comprehension and discrimination as to the principles of law involved in the case. Without darkening counsel by words, and without exploring or attempting to make any contribution to the learning in regard to contributory negligence, it may be said with entire confidence that on the facts produced in evidence by appellee, many of which are not controverted, appellant is answerable for damages in the cause, unless a railroad company, in the prose-

cution of its business, may set a trap for people, and after a man has been caught in it and killed or injured, escape liability by assuming the position that he ought to have had more sense and discretion than to have been deceived or misled by the contrivance. If there is any authority which supports such defense, we decline to follow it.

Whether appellant was under obligation to make an opening through its freight train for the benefit of the public, at or about the depot, when it was on the side track between the depot building and the main track, it did in fact make DUTY OF RAILROAD COMPANY. an opening, and had done so habitually before, which was and had been used by the public generally without objection by appellant. The action of appellant, in this respect, amounted to an inducement and invitation to the public to avail of the opening thus made for the purpose of passing across the side track. Under these circumstances, it was the duty of the railroad company to use reasonable care and prudence to protect persons from injury, crossing the track at that point. *Murphy v. Boston & A. R. Co.*, 133 Mass. 121; *Sweeny v. Old Colony R. Co.*, 10 Allen, 368; *Stewart v. Pennsylvania R. Co.*, 14 Amer. & Eng. Cas. 679.

Appellee was bound at his peril to act, under the circumstances, as a reasonable and prudent man, and if, acting thus, he was injured, he was entitled to indemnity, if, by ordinary and reasonable care on the part of the railroad company, the injury might have been avoided. *Bardwell v. Mobile & O. R. Co.*, 63 Miss. 574; *Vicksburg & M. R. Co. v. McGowan*, 62 Miss. 682; *Vicksburg & M. R. Co. v. Alexander*, Id. 496. This was the view of law submitted to the jury, and the facts warranted the conclusion which they reached.

It cannot be said that the damages of \$15,000, awarded by the jury, are excessive. We apprehend that but few, if any, persons would submit to the injury and suffering DAMAGES' NOT EXCESSIVE. sustained by appellee for that sum.

If the theory of law propounded by appellee's counsel in his argument to the jury, in regard to the obligation of the railroad company to open the freight train so that any one might pass through, when the passenger train was at the depot, was deemed unsound, appellant should have asked instruction from the court for the jury on that point. There was no such abuse of the privilege of counsel in the matter as to call for correction here.

There is no error in the record, and the judgment is affirmed.

Excessive Damages.—Where the damages are so grossly excessive and unjust, that, in the opinion of the court, the jury in awarding them must have been influenced by passion, prejudice, or partiality, or have proceeded upon a wrong principle, a new trial should be granted. *B., P. & C. R. v. Pixley*, 51 Ind. 22; *Delphi v. Lowery*, 74 Ind. 520; *Gale v. N. Y. Central*, etc., R. 76 N. Y. 594; *Berry v. C. R.* 40 Iowa, 564; *P., C. & St. L. R. v.*

Sponier, 85 Ind. 165; s. c., 8 Am. & Eng. R. R. Cas. 453; Graham v. Pacific R. Co., 66 Mo. 536.

For Wrongfully Ejecting a Passenger.—Thus, \$3000 was held to be excessive damages for wrongfully expelling from a car a passenger who had lost his ticket for a sleeping-car berth, but gave satisfactory assurance that he had purchased the ticket. He was held entitled to recover only the price of the ticket and a reasonable compensation for the inconvenience of being deprived of his berth, Pullman, etc., Co. v. Reed, 75 Ill. 125. In Quigley v. Cent. Pac. R. Co. 11 Nev. 350, the plaintiff presented his ticket to the conductor, who took it up and refused to allow him to ride without paying his fare again, as the ticket agent had informed him that plaintiff had obtained the ticket without paying for it. Plaintiff was accordingly put off the train over a quarter of a mile from the station where he had started, no more force being used than was necessary. He was delayed one day, and had to purchase another ticket at an expense of \$40.50. *Held*, that a verdict of \$5000 was so excessive as to indicate passion and prejudice on the part of the jury. So a verdict for £50 was held to be excessive for ejecting a passenger from a train because the conductor thought he had not given him his ticket. He was ejected three miles from the station at which he started and after waiting four hours, took the next train to his destination. Huntsman v. Great Western R. Co. 20 Upper Canada, Q. B. 24.

Damages Held Not Excessive.—Where the conductor took up the passenger's ticket and when within a few miles of his destination, accused him of riding beyond the point for which he had paid, treated him insolently, and put him off the train where there was no station at nine o'clock on a dark night, *held*, that a verdict for \$700 was not excessive. Indianapolis, etc., R. Co. v. Milligan, 50 Ind. 392.

In Du Laurans v. St. Paul, etc., R. Co., 15 Minn. 49, the conductor demanded ten cents more than the regular fare, which was fifty cents, from the plaintiff for not procuring a ticket before entering the car, which amount plaintiff refused to pay. The conductor, while retaining the regular fare, ejected plaintiff at the next station, which was not his place of destination. The supreme court, while considering a verdict of \$500 large, would not disturb it.

The conductor of a railway train, after a short conversation with a female passenger, seized and kissed her several times without encountering much resistance. *Held*, that \$1000 was not excessive damages. Ryan, C. J. said: "She was entitled to liberal damages for her terror and anxiety, her outraged feelings and insulted virtue, for all her mental humiliation and suffering." In Illinois, etc., R. Co. v. Johnson, 67 Ill. 312, the passenger was put off the train in the night time at some distance from a station, for not procuring a ticket before entering the train. The passenger informed the conductor that the station was closed and offered him the regular fare, which was refused. *Held*, that the sum of \$200 was not excessive damages. In a similar case, a verdict for \$500 was held to be excessive. Illinois, etc., R. Co. v. Cunningham, 67 Ill. 316. See also, Toledo, etc., R. Co. v. McDonough, 53 Ind. 289; Graham v. Pacific R. Co., 66 Mo. 536.

For Injuries in Railroad Accident.—In Sawyer v. Hannibal, etc., R. Co., 37 Mo. 240, the injuries to a passenger in a railroad accident, consisted of bruises about the shoulders and head, a scalp wound which quickly healed, and a shock to the nervous system. The plaintiff admitted that her injuries were not serious, shortly after the accident, and was able to resume work two or three months afterward. *Held*, that \$6900 was excessive damages. Where the plaintiff lost one month's work, and his injuries consisted of a straining of the ligaments of a finger of his right hand, which weakened it, and a weakening of one lung, a verdict of \$5000 damages was held excessive. Union Pacific R. Co. v. Hand, 7 Kans. 380. In Clapp v. Hudson, etc., R. Co.,

19 Barb. (N. Y.) 461, plaintiff's leg was broken and his head somewhat injured in a collision. He was obliged to go on crutches for three or four months, and though the injured leg, when healed, was somewhat shorter than the other, yet he recovered his usual health. The court reduced a verdict for \$6000 damages, to \$4000. See also, Chicago, etc., R. Co. v. Pondrom, 51 Ill. 333; Chicago, etc., R. Co. v. Hughes, 69 Ill. 170.

For Carrying Passenger beyond Destination.—In New Orleans, etc., R. Co. v. Hurst, 36 Miss. 660, plaintiff was carried four hundred yards beyond his station, and as the conductor refused to back the cars to the station, he was obliged to get off. He obtained a verdict for \$4500 which the Supreme Court declined to disturb. This case was afterward criticised in New Orleans, etc. R., Co. v. Statham, 42 Miss. 607, where the court set aside a verdict for \$3275, for carrying plaintiff, a person in ill-health, about sixty feet beyond the platform of the station.

ST. LOUIS, IRON MOUNTAIN AND S. R. Co.

v.

WHITE, by Next Friend.

(*Advance Case, Arkansas. March 19, 1887.*)

In an action to recover from a railroad for damages received by plaintiff while alighting from a passenger train, *held*, although the length of the stop was sufficient to enable him to leave the train in safety under ordinary circumstances, and he was young, presumably active, unincumbered with baggage, and the failure of the company adequately to light its station and platform was not shown to have contributed directly to the injury, yet, the injury having been found by the jury to have been caused by the railroad's negligence in this respect, the court on appeal will not disturb the verdict, it appearing that the instructions given were correct.

APPEAL from circuit court, Nevada county.

Dodge & Johnson for appellant.

Smoot, McRae & Hinton for appellee.

SMITH, J.—White recovered a verdict and judgment for \$1,000 against the R. Co. for injuries sustained by him as a passenger in alighting from one of its trains. The supposed FACTS. omissions of duty by the defendant consisted in failing to stop the train long enough to enable the plaintiff to get off in safety, and in imperfectly lighting the station for which the plaintiff was bound. He was in his twentieth year, and the accident happened about two A. M. of a dark night. His testimony was that as soon as the station was announced, and the train had come to a standstill, he arose from his seat, made his way out to the car platform, saw no lights, and was in the act of stepping onto the station platform,

when the train suddenly started, and threw him between the train and platform, crushing his foot. He also swore that the train stopped about three minutes or less; that the cars were lighted, and cast some light on the platform, which he could see as he was in the act of stepping off. The other testimony, as well that for the defendant as that given in behalf of the plaintiff, conduced to establish the facts that the train stopped near three minutes, and that the station was insufficiently lighted.

There is no doubt that the plaintiff received a painful injury, permanently impairing his ability to earn a livelihood. But the connection between that injury and the defendant's negligence is not so apparent. The length of the stop was sufficient to give him time to leave the train under ordinary circumstances. He was young and presumably active, unincumbered with baggage, and the only passenger for that station. The failure of the company adequately to light its station and platform is not shown to have contributed directly to the injury. Nevertheless the jury may have concluded that this circumstance was a potent factor in producing the result; and, as the case was submitted to them under proper instructions, there is no good reason for disturbing their verdict. Affirmed.

THE INSTRUCTIONS BEING CORRECT, THE VERDICT WILL NOT BE DISTURBED.

See next case and note.

ALABAMA G. S. R. Co.

v.

ARNOLD.

(*Advance Case, Alabama May 31, 1887.*)

In an action for damages for personal injuries, where the original complaint alleges that the accident was caused by the negligence of the railroad company, in failing to provide a light at the station, whereby the plaintiff would have been able to avoid the fall from the platform of the station, an amendment allowing a new count to the complaint, one year after, alleging, as new matter, that the construction of the platform rendered the same unsafe, does not introduce a new cause of action, but varies the allegations as to a matter already in issue; and is not barred by the Alabama statute of limitations of one year.

Where there is evidence tending to show that the fall and injury of plaintiff immediately followed his leaving the ticket office to take the train, it cannot be affirmed on the evidence, as matter of law, that the absence of a light was not the proximate cause.

Where a passenger has purchased a ticket, intending to take passage on the expected train, and remains in the office until the approach of the train

is announced, and when he does what all other persons, in like circumstances, had done for years, without accident or injury, he cannot be deemed *prima facie* guilty of a want of ordinary care if he fails to call for a light or assistance in taking the train, although familiar with the situation.

When negligence is so gross as to evince an entire want of care, and is sufficient to raise a presumption that the defendant, being cognizant of the probable consequences, is indifferent to the danger to which the person may be exposed, exemplary damages may be awarded; and, the degree of negligence being a question for the jury, an instruction that the plaintiff cannot recover exemplary damages invades the province of the jury, and is properly refused.

It is not error to permit the attorneys of the plaintiff to examine the written charges requested of the court by the defendant, before submission of the same to the jury.

Code Ala. § 3109, which provides that "charges moved for by either party must be in writing, and must be given or refused in the terms in which they are written, and must be taken by the jury with them in their retirement," does not abrogate the practice of reading them to the jury, and to have them so read is a matter of right.

The testimony of the plaintiff as to the statement of his attending surgeon to him, "that the operation was a dangerous one," is inadmissible as hearsay evidence.

APPEAL from circuit court, Greene county.

Action for damages for personal injuries, by John W. Arnold against the Alabama Great Southern R. Co. Plaintiff claimed damages for an injury done him February 10, 1885, when "plaintiff attempted to descend the steps of said platform for the purpose of entering the car, and, in attempting to do so, fell, and thereby received severe personal injuries, to his damage, to wit, ten thousand dollars, as aforesaid. And the plaintiff avers that said fall and injuries were caused by the negligence of the defendant, or servants, in failing to provide a light at said station, whereby plaintiff would have been enabled to see his way, and avoid said fall and injuries; that no light was provided, but the darkness of the night then and there prevailed, and said fall and injuries resulted therefrom, and not from any fault or neglect on the part of the plaintiff." This complaint alleged the injury occurred February 11, 1885, and set forth other essential allegations.

On April 20, 1886, the court allowed an additional count to be filed, which contained substantially the same averments as the first count, but which alleged, among other things, that "the surface of said platform was elevated about four or four and a half feet above the ground; and plaintiff avers that the construction of said steps and platform, as above described, rendered the same unsafe and dangerous, and liable to cause personal injuries to persons passing over the same; . . . and as said train, which arrived on regular schedule time, was about arriving, the plaintiff attempted to pass over said platform, and the steps constructed as aforesaid, for the purpose of entering the cars, and in attempting so to do, missed said steps, and fell to the ground, and thereby received

severe personal injuries," etc. The defendant pleaded to said complaint: (1) not guilty; (2) contributory negligence; (3) as to so much of the new count as alleges that the construction of the said steps and platform rendered the same unsafe and dangerous, the defendant says and pleads that the matters thus alleged in said new count were introduced into this cause for the first time by said new count, and were not embraced in the original complaint in this cause, and that the said matters so introduced into this cause are barred by the statute of limitations of one year, and occurred more than one year before said new count was added; (4) accidental injury; (5) want of ordinary care. The plaintiff demurred to said third plea, which the court sustained, and took issue on the other pleas.

The evidence for the plaintiff tended to show that on the night of February 11, 1885, he went to Boligee station, on the defendant's railroad, for the purpose of buying a ticket for his passage to Eutaw station, upon said railroad. Plaintiff bought said ticket, and, when he heard the train coming into the station, started to the place where passengers boarded the train. This was between 7 and 8 o'clock, and the night was dark and cloudy, so that plaintiff could not see the platform or steps that lead from the platform. In attempting to pass from the platform to the ground, the plaintiff's foot slipped, and he fell, seriously injuring his private parts. He went on to Eutaw, and while on the train discovered the extent of his injuries, which he had felt on falling, and on arriving there immediately summoned medical help. The only light in the depot was a small lamp, which gave a very weak light. Said lamp was, at the time of the injury, on the desk behind the door shutters, and gave no light on the platform, where there was no light. Plaintiff was under medical attention, and unable to do any work for a long time, his injuries being severe and long continuing. Plaintiff proved that an operation had been performed on him by Dr. Martin, and that "Dr. Martin informed him that the operation was a dangerous one." To the admission of this testimony defendant duly excepted. The evidence for the plaintiff tended to show the nature and extent of the injury received, and the character of treatment given it.

The evidence on behalf of defendant tended to show that no one fell off the steps or platform in question that night except plaintiff, and no other person was ever known to fall therefrom; but that after the accident the platform was repaired, because the complaint was that strangers might get hurt. It was further shown that plaintiff had been about the said station several times, and that on the night in question, after buying his ticket, he walked out on the platform, and fell therefrom; that he returned to the station, and in answer to an inquiry as to whether he was hurt replied, "Not much, if any." The evidence also tended to show

that the lamp in the station-house was brightly burning, and so located that it threw the light out of the door, upon the platform, toward the steps; that there were two lanterns also at said stations, lit and burning, and that it was the duty of the porter to light persons to and from the train, which he did.

The evidence being closed, the counsel argued the case, and the court charged the jury. "At the close of the oral charge the court referred to the seventeen several charges in writing hereafter set forth, each of which the defendant had delivered to the court after the foregoing evidence had been introduced on trial, with a request that each of said charges separately be given by the court. On thus referring to said several charges, the court remarked that it would give some of said several charges, and refuse others, but that it had not entered any action or intended action of the court on any of said charges. Thereupon the two attorneys who had made said opening and closing speeches for the plaintiff requested the court to allow them to have and to examine said several charges, each of which the defendant had asked the court to give, in order that they (the said attorneys of plaintiff) might have the opportunity to make waivers as to each of said charges, and might prepare counter-charges, or take such other course as they might deem best for the plaintiff. The defendant, by its attorneys, objected to the said request by said attorneys of plaintiff; but the court overruled said objection, and delivered said seventeen several charges to the attorneys of the plaintiff, who examined them, and redelivered them to the court, with expression of their wishes." To said actions of the court the defendant duly excepted.

The court, having marked "Refused" on charges 1, 2, 3, and 4, handed them to the jury, with the instruction "that they must regard and treat each of these four charges as not containing any correct statement of law;" to which action of the court defendant duly excepted. The court having marked "Given" on the charges from 5 to 17, the defendant asked the court either to read these charges to the jury or to allow one of the defendant's attorneys to read them to the jury. But the court overruled this request of defendant, and refused either to read said last-mentioned charges, or any of them, to the jury, or to allow any of said last-mentioned charges to be read to the jury; to which actions of the court the defendant duly excepted. The court then handed the said charges to the jury, and directed them to read all of them, and to take the 13 charges which were marked "Given," in connection with the said oral charge of the court, as announcing law, and each of the charges marked "Refused" as not announcing law; to which actions of the court the defendant duly excepted.

The said charges, which the court separately refused to give, although requested in writing by the defendant, and to which actions of the court defendant excepted, are as follows: "(1) If the

jury believe all the evidence, they must find for the defendant under the first count of the complaint. (2) If the jury believe all the evidence, they must find for the defendant under the second count of the complaint. (3) If the jury believe all the evidence, the jury are not authorized to give to the plaintiff exemplary damages. (4) If the jury believe all the evidence, they are not authorized to find that the injury to the plaintiff was wanton or intentional, or to assess exemplary damages against the defendant.

The jury having found their verdict for the plaintiff for \$9000, the defendant appeals, and assigns the actions of the court in sustaining said demand, and those noted as excepted to, as error.

Saml. F. Rice, Thos. R. Roulhac, and T. C. Clark for appellant.

J. B. Head, contra.

CLOPTON, J.—The original complaint, which contained but one count, sets forth as the cause of action that the plaintiff, on February 11, 1885, sustained injuries by reason of the negligence of defendant in failing to provide light at a station called Boligee, where persons, desiring to take passage on the trains, were required to purchase tickets, and to which place the plaintiff went for the purpose of purchasing a ticket to take passage on a train which arrived after dark. After the expiration of more than one year from the time of the injury, the complaint was amended by the addition of another count, which alleges the same injury as occurring at the same time and from the same cause as in the original complaint, but introduces a minute description of the height, dimensions, and condition of the platform on which the ticket office was erected, and of the steps leading thereto. To these additional allegations the defendant pleaded the statute of limitations. The amendment does not introduce a new cause of action, but varies the allegations as to a matter already in issue. The injury, and the negligence complained of as the cause, are the same as set forth in both counts; and, while it is averred that the construction of the steps and platform rendered them unsafe and dangerous, this does not constitute the negligence alleged to be the cause of the injury on account of which a recovery is sought; but, as we interpret the count, the allegations are intended to show a greater and more imperative duty to provide a light, from the failure to do which, it is distinctly and expressly averred in the new count, the injuries resulted. Under neither count is the plaintiff entitled to recovery for any negligence other than the failure to provide a light. *Toledo, W. & R. Co. v. Foss*, 88 Ill. 551. The statute of limitations will not avail, when the amendment does not introduce a new cause of action, unless the bar is complete at the time of the institution of the suit. *Dowling v. Blackman*, 70 Ala. 303.

The right of the defendant to the affirmative charges requested is rested on two grounds: That the evidence fails to establish the legal relation of cause and effect between the particular negligence or wrong described, and the fall and injuries complained of; and that plaintiff's own negligence contributed thereto. Unquestionably, the negligence of the defendant must be the proximate cause of the injury to entitle the plaintiff to recover; that is, that the injury sustained was such as might have been reasonably anticipated in the ordinary and usual course of events. No difficulty arises when the damage directly follows the wrong; when they are so proximately contemporaneous that no time or occasion is afforded for the operation of another instrumentality. It ordinarily arises when there is an intervening cause, or several causes contributing to the result. Generally, in such case, the law will attribute the injury to the last cause, when it follows in immediate succession. But the agency nearest in point of time is not regarded in every case as the proximate cause, in contemplation of law. The injury will be referred to the nearest and immediate agency only when it is independent of the original act or conduct of the defendant. If the intervening causes are merely incidental, having been set in motion by the first cause, and are not new and independent forces sufficient of themselves to cause the disaster, the law passes these, and traces the injury to the wrongful act which puts them in operation. The principle is that, if the injury is produced by the wrongful act during the continuance of its causation, it will be regarded as the proximate cause; but as too remote, though furnishing the occasion, when the injury occurs after the act is completed and terminated, by the intervention of another and independent cause. "On the intervention of other agencies, the inquiry should be, is the original wrongful act an antecedent, efficient, and dominant cause, which put the other causes in operation?" Cooley, Torts, 70; Insurance Co. v. Boon, 95 U. S. 117; Billman v. Indianapolis, C. & L. R. Co., 40 Amer. Rep. 230; Jordan v. Wyatt, 4 Grat. 151; Ricker v. Freeman, 9 Amer. Rep. 267; Sheridan v. Brooklyn, C. & N. R. Co., 36 N. Y. 39; East Tennessee, V. & G. R. Co. v. Lockhart, 79 Ala. 315.

But it is unnecessary to pursue this line of consideration further, for it will be observed there is no pretence of a third independent cause having intervened; but the contention is that the proximate cause was the slipping of plaintiff's foot from under him, as he was stepping from the platform, and that the fall and injury were either purely accidental, or the result of a want of ordinary care and caution on his part. In the cases to which our attention has been cited there was either an independent intervening cause, or the action of the independent will of the party injured, or contributory negligence. In one of the cases, *Henry v. St. Louis, K. C.*

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& N. R. Co., 43 Amer. Rep. 762, the plaintiff, being a passenger, was directed to change cars at a way station, and, having entered the caboose attached to another train, was ordered to get out by an employé, because the train was not ready. After standing a short time on the platform, he stepped on an adjacent track, and while standing there was injured by another train. It is said: "If any injury had happened to him while in the act of prudently obeying the order to get out of the caboose, such injury would have been the proximate result of his expulsion; but after he was out of the caboose he was entirely free to select his own position, and did so after some minutes of meditation and consultation as to what course he should pursue." And further: "If the plaintiff, at the time he was injured, had been on his way to the caboose, or otherwise lawfully crossing the track, and before crossing the same had looked and listened, and could neither see nor hear an approaching train, he would undoubtedly have a right of action." The principle extracted is that his expulsion was not the proximate cause, though the occasion, of his injury, by reason of having put himself in the exercise of his independent will, in an unlawful position, after the causative power of his expulsion had terminated; but if, in consequence of the order to leave the caboose, he had been in a position where he could be lawfully, and had exercised due care, the injury would have been referred to his expulsion. It may be conceded that the immediate occasion of the fall and injury of plaintiff was the slipping of his foot. But back of this recur the questions, was a light necessary to enable persons to see their way safely from the ticket office to the cars? and was the want of such light the efficient and dominant cause, producing the false step, which caused plaintiff's foot to slip? Though no action lies if the fall was accidental, and without the fault of defendant, these are questions resting in inference, and were properly submitted to the jury. There being evidence tending to show that the fall and injury of plaintiff immediately followed his leaving the ticket office, it cannot be affirmed on the evidence, as matter of law, that the absence of light, if such be the fact, was not the proximate cause. *East Tennessee, V. & G. R. Co. v. Lockhart*, 79 Ala. 315.

As long and well settled in this State, contributory negligence is matter of defence, and the burden of establishing it is on the defendant. Unless there is no conflict in the evidence, and no material fact left to inference; unless on the undisputed facts, and all inferences that may be reasonably deduced, it follows, as a conclusion of law, the affirmative charge was properly refused. The argument is that plaintiff was in possible danger while he remained in the ticket office; that he knew the surroundings and the circumstances which endangered him, and that they demanded precautionary measures. Notwith-

NO CONTRIBUTORY
NEGLIGENCE.

standing, he chose to take the risk without calling for light or assistance, the omission of which is want of ordinary care. The principle invoked is, that, if a passenger unnecessarily exposes himself to danger, he does so at his own peril; and that to put his life in jeopardy, to save himself from mere inconvenience, is inexcusable rashness. The law unquestionably devolves on railroad companies the obligation, not only to properly construct and keep in safe condition their ticket office, and the platforms and approaches thereto, but also to provide sufficient and suitable light when the trains arrive and depart in the night-time. *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448.

The plaintiff was at the station by the implied invitation of defendant. He had purchased a ticket, intending to take passage on the expected train; and there is evidence tending to show that he remained in the ticket office until the approach of the train was announced by the blowing of the whistle. The necessity of persons desiring to take passage on the trains, and the invitation to the traveling public to go to the ticket office, is a standing and continuing assurance that due precaution will be taken to insure safety. If the defendant held out to the plaintiff that the situation and condition of the platform and steps were such as to afford safe and suitable passage without a light from the ticket office to the train, less vigilance and care will be required. *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208. Ordinary care, as generally defined, is such care as men of common prudence use in like position and circumstances. The plaintiff cannot be deemed *prima facie* guilty of a want of ordinary care if he did what all other persons, in like circumstances had done for years, without accident or injury. *City Council Montgomery v. Wright*, 72 Ala. 411. If, therefore, by the fact that defendant held out the place as safe and suitable, by the plaintiff's familiarity with the situation, and by its constant and actual use, he was induced to *bona fide* believe that he could pass with safety, using due care in walking, and he did use such care, he cannot be charged with having unnecessarily exposed himself to danger, or with a want of ordinary care and caution. On the other hand, if the plaintiff knew that it was dangerous to attempt to pass in the dark, and did not honestly believe that he could do so without accident or injury, and there was a light convenient, of which he would have had the benefit, and he omitted to avail himself of its advantage, these are circumstances which may be considered in determining whether the plaintiff unnecessarily exposed himself to danger. But, these material facts resting in inference, it results that the question of contributory negligence was properly submitted to the jury.

The circumstances under which exemplary damages may be assessed, have been so often, so fully, and so recently considered, that further discussion is not required. The record not informing

us that special instructions were asked, relating to the circumstances under which such damages may be allowed, a mere statement of the rule will suffice. Without resting its application to be determined by the shadowy and indefinable line that distinguishes gross from ordinary negligence, a somewhat more specific rule has been established by our decisions. That rule is, when negligence is so gross as to evince an entire want of care, and is sufficient to raise a presumption that the defendant, being cognizant of the probable consequences, is indifferent to the danger to which the persons or property of others may be exposed—"a conscious indifference to consequences"—exemplary damages may be awarded. It is not necessary that the injury shall be wilful. *Wilkinson v. Searcy*, 76 Ala. 176; *Leinkauf v. Morris*, 66 Ala. 406; *South & N. A. R. Co. v. McLendon*, 63 Ala. 266. In the case last cited, the plaintiff sustained injuries caused by the failure and neglect to keep in proper repair a bridge which the railroad company had erected on its right of way on a public highway, and which had been out of repair for several weeks. It was held that the plaintiff might recover exemplary damages if the negligence was gross, and that a charge that the plaintiff cannot recover such damages was properly refused; the degree of negligence being a question for the determination of the jury. The same ruling is applicable in the present case. Had the instruction been given in the terms written, the court would have invaded the province of the jury.

It is difficult to conceive any step or proceeding taken in open court, by either party, in the conduct and progress of a trial, of which the adversary party has not the undoubted right to be informed, and the opportunity to examine, and deny or avoid. Concealment and secrecy in such case are violations of the rights of litigants, and contravenes the policy of public trials, and the right of every party to be heard. There is no error in the court having permitted the attorneys of the plaintiff to examine the written charges requested by defendant. An examination was proper, and may have been necessary to enable them to determine whether to waive, except, or ask explanatory or qualifying instruction.

The uniform practice was, prior to the enactment of section 3109 of the Code, and the general custom since has been, to give orally instructions, and read or cause to be read to the jury charges required by the statute to be in writing. The section provides: "Charges moved for by either party must be in writing, and must be given or refused in the terms in which they are written; and it is the duty of the judge to write 'Given' or 'Refused,' as the case may be, on the document, and sign his name thereto, which thereby becomes a part of the record, and must be taken by the jury with them on their retirement." The

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purpose of requiring requested instructions to be in writing is to prevent misunderstanding between the judges and the attorney. The judge is required to write "Given" or "Refused," and sign the same, that they may become parts of the record; and the jury are allowed to take them during their deliberations, to avoid errors of memory, or failure of recollection, or the confusion of charges as given or refused. *Miller v. Hampton*, 37 Ala. 342. It was not intended by providing that the jury may take the charges with them on their retirement, which applies alike to those *given* or *refused*, to abrogate the practise of reading or causing to be read to the jury, and to substitute handing them to the jury therefor. Not having expressly declared the mode of giving instructions, the statute merely requires the judge to write "Given" on such charges as are given, in conformity with the common practise. Reading the charges is calculated to impress the jury that instructions prepared by counsel, and given, are entitled to equal consideration with the general charge of the court, and to enable them more thoroughly to comprehend the principles of law applicable to the different aspects of the case, by having their attention thus specially directed to the instructions. All communications between the court and the jury should be had in the hearing of the parties. It was intended by the statute to prohibit withholding the charges from the jury after having been read to them. It was the right of the defendant to have the instructions moved for and given read to the jury.

While the nature and danger of the operation to which plaintiff was subjected are proper circumstances to be considered in determining the anxiety, and mental and physical pain caused thereby, and while it may have been proper to show the mere fact that he was informed, without calling for the declarations themselves, it is not permissible to prove by the plaintiff, for any purpose, what the surgeons said to him. They do not fall within any of the exceptions to the general rule of the inadmissibility of hearsay evidence. *Blackman v. Johnson*, 35 Ala. 252. Reversed and remanded.

Station Approaches.—The railroad company is bound to properly construct and keep in safe condition its ticket offices, platforms and approaches thereto, and furnish safe and proper means of ingress and egress therefrom. *Burgess v. G. W. R.*, 6 C. B. (M.S.) 923, 95, E. C. L.; *Nicholson v. L. & Y. R.*, 3 H. C. 534; *Clussman v. L. I. R.*, 73 N. Y. 606; *Hulbert v. N. Y. C. R.*, 40 N. Y. 145; *Bennett v. L. & M. R.*, 102 U. S. 577; *Harburg v. C. & N. W. R.*, 49 Wis. 358; s.c., 1 Am. & Eng. R. R. Cas. 65.

In *Brassell v. N. Y. C. & H. R. R.*, 84 N. Y. 241; s.c., 3 Am & Eng. R. R. Cas. 380, *Andrews, J.*, said: "A passenger when taking or leaving a railroad car at a station has the right to assume that the company will not expose him to unnecessary danger; and while he must himself exercise reasonable care, his watchfulness is naturally diminished by his reliance upon the discharge by the company of its duty to passengers to provide them with a safe passage to and from the train."

See also, 3 Am. & Eng. R. R. Cas. 384, note.

Lights at Stations and Platforms.—The railroad company must also furnish sufficient lights at its stations and platforms to securely guide the steps of its passengers, and is liable for injuries resulting from its failure to do so. *Stewart v. I. & G. N. R.*, 53 Texas 289; s.c., 2 Am. & Eng. R. R. Cas. 497; *Knight v. P. S. & P. R.*, 56 Me. 234; *Buenemann v. St. P. M. & M. R.*, 32 Minn. 390; 18 Am. & Eng. R. R. Cas. 153; *Patten v. Chicago, etc. R. Co.*, 32 Wis. 524; *Osborne v. Union Ferry Co.*, 53 Barb. (N.Y.) 629; *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448.

MOSES

v.

LOUISVILLE, N. O. AND T. R. Co.

(*Advance Case, Louisiana. May 23, 1887.*)

It is the legal duty of railway companies, as carriers of passengers, to provide platform and other accommodations for passengers who desire to take their trains at stations where passengers are usually taken on or put out; to furnish safe and proper means of ingress and egress to and from trains, platforms, station approaches, etc.; and to furnish at night sufficient lights to securely guide the way and the steps of their passengers, as well as servants necessary to inform them and instruct them as the location of the trains, and as to the usual and safest mode of reaching them. This rule, which courts must rigidly enforce, is violated by a railroad company which, for any reason, leaves one or more coaches of a passenger train outside of the depot yard or station grounds at which the train stops to take on and put out passengers, and which thus obstructs at night the lights so situated by the city as to lighten both sides of the track on which the train stands.

Hence a railroad company is responsible for injuries received by a passenger seeking to board one of its trains at night, who finds no one to inform him how to reach the sleeping-car attached to the train, which is left standing outside of the yard, and to which a sidewalk, erected by the company under a contract with the city, leads in a direct route, which the passenger follows, and from which he falls by reason of defective or insufficient lights at that part of the station approach.

It is not contributory negligence in a passenger who goes outside of the station yard to enter the coach which he desires, when that coach is left standing outside of such yard, and when a sidewalk erected by the company, and under its control, leads directly to said coach.

Damages allowed by a jury will not be increased on appeal, unless manifestly inadequate.

APPEAL from civil district court, parish of Orleans.

D. C. & L. L. Labatt for plaintiff.

Farrar & Kruttschnitt for defendant.

POCHE, J.—Plaintiff claims damages in the sum of \$20,000 for personal injuries received by him while boarding a train of the de-

defendant company at the city of Vicksburg, Mississippi, during the night of January 14, 1885, which he attributes to the negligence and want of care of the defendant and of its employees. The defence is a general denial, a special denial of negligence on the part of the company, and a charge of contributory negligence on the part of the plaintiff. The jury found in favor of plaintiff, to whom they allowed \$1000. Defendant appeals, and plaintiff prays for an increase of the allowance for damages in the sum of \$7000.

The undisputed facts of the case are as follows :

Plaintiff, who is a resident of New Orleans, purchased a ticket at the defendant's office in Vicksburg, from that point FACTS. through to this city, to be used at the date above stated, on a train leaving Vicksburg at 9 o'clock at night. Within twenty minutes of train-time he reached the depot or station of the company, and remained with a companion, who was to make the same trip, in a waiting-room within the building used as a passenger station, until the arrival of the train. That building is situated at the north-western corner of a square of ground owned and occupied by the company for the purposes of a common carrier. The south-bound trains enter the depot yard at the intersection of two streets known as Levee and Depot streets—the first of which runs north and south, and the latter east and west. Down to that point the railroad track is on Levee street; thence it diverges from that street, in a southeastern course, into the square of ground owned by the company. The depot yard, which is bounded on the west by Levee street, and on the north by Depot street, is inclosed by a fence, leaving at the junction of the two streets an opening through which the trains enter into the yard. On Levee street the fence extends from the station-house, which fronts thereon, to the intersection of Depot street. The depot yard, which is on both sides of the track, is usually approached by passengers either on Depot or Levee streets, through gates provided for the purpose, the Levee street gate being situated near the station-house. It was at that gate that plaintiff and his companion alighted from a carriage and through it they walked into the depot yard, and into the waiting-room or ticket-office, which opens into the yard in the rear or east end of the building used as a station. The depot yard on that side of the railroad track is a wooden platform, several feet above the ground or level of the adjoining streets, and extending as far as the street proper, or Levee street, the sidewalk being of the same grade and of the same material, and marked out of or separated from the railroad yard proper by the fence above described, and ending onto the Depot street corner. The construction of the sidewalk by the railroad company, as well as its dimensions and grade, were stipulated in a contract between the city council of Vicksburg and the company.

Now, it happens, owing to the length of some of the trains,

when going southward, that one and sometimes two, of the passenger coaches are stopped, and left standing outside of the depot yard, across Depot street, and that on the night of the accident to plaintiff the sleeping-car, which was the last coach on the train, was entirely outside of the yard; and it was in his attempt to reach that coach, with a view to secure accommodations for the night, that plaintiff met with the accident on which he predicates his claim. As he stepped out of the waiting-room on the arrival of the train, he saw that the sleeper was at the end of the train, and, walking toward it, he passed out of the gate hereinabove described, near the station, to the sidewalk, and on the latter, at the end of which he fell to the ground and broke one of his legs. From that period of the case all the facts bearing on the issues involved are hotly contested, and the truth must be sought out of a mass of conflicting testimony.

Our reading of the record has satisfied us that the preponderance of the evidence shows that the principal cause of the accident must be attributed to the lack of sufficient light to guide the passengers in their efforts to board the train, and that it was owing to the darkness that prevailed that plaintiff fell off the sidewalk. The effect of a city gaslight, situated on Depot street, at the left side fence of the yard was entirely lost to persons who were on the right-hand side of the train, by the sleeper, which stood in its way, and entirely out of the depot yard; and the railroad lamps, in which oil was burned, and which were situated immediately around the station-house, were not strong enough to be of any use to persons walking to the rear of the train on the sidewalk.

But at this point, and in this connection, must be noted the charge of contributory negligence made against plaintiff by the defendant, who says that the usual and safe mode of boarding its trains was to walk directly east from the waiting-room to the track, only a short distance, to then ascend the steps of the first coach in the way, and thence to walk through two or more coaches, as the case might be, to the sleeper, in case the passenger desired sleeping accommodations; and that the existence of the fence above described was a sufficient indication of the extent of the depot grounds, and a sufficient caution to passengers not to venture outside if they wished to avail themselves of the company's protection. It is also urged that the city sidewalk from which plaintiff fell was not part of the company's platform; that the company had no control over the same, and was therefore not responsible for any accident which might occur thereon or therefrom.

The first answer to that contention is found in the record, which shows that plaintiff, who had never before been at the place, and had arrived there for the first time on a dark night, with very dim

lights to guide his steps, was not aware of the distribution of the road's appliances and facilities, and that no employé or servant of the company offered to instruct or guide him in the proper course to pursue. Hence he cannot be considered as negligent or legally imprudent in following the route which, in his judgment, was the safest and the shortest for the purpose of reaching the sleeper, which was his objective point.

The second answer also comes from the record, which shows that passengers approached and left the train indifferently on either side of them. It appears that the driver of the hack brought plaintiff and his companion, without instructions from them or either of them, to the sidewalk in question, and that carriage drivers, watching for customers on the arrival of trains, stood on either side of the depot yard; the very hackman who helped to raise plaintiff after his accident was standing on that side with his carriage in expectation of customers. From our understanding of the contract between the city and the company, as to the construction of the sidewalk, we consider that the defendant is under the legal obligation to keep it in good order and repairs, as one of the approaches of its station. It is used by the company to receive all baggage, whether going to or coming from trains, and an inclined platform connects it with the street below, at the gate through which plaintiff went in and out of the depot yard on the night of the accident. It is clear to our minds that the defendant would be responsible for any injury occasioned on that sidewalk, by reason of a rotten plank, to any of its passengers, either going to or leaving one of its trains. It is, indeed, used by it as one of its appurtenances.

But, in law and in justice, why should this company be heard to charge negligence, imprudence, or recklessness to any of its passengers for going out of its inclosures to reach the coach which he desires, when that coach itself is out of the company's yard, and actually intercepts the street which crosses at that point? From the description which we have already given of the grounds, it is undeniable that, if a coach of the company had not stood in Depot street, the city gas-light, the best and the only gas-light on and around the grounds, would have been amply sufficient to lighten the sidewalk, separated from it only by the train; and it is as clear that, if the sleeper had stood within the depot yard, plaintiff would have gone directly to it, without going outside of the yard; and in either case the accident would not have occurred. Hence the conclusion is inevitable that the accident is solely attributable to the fact that the sleeping car was not pulled inside of the yard, and that, in consequence of its standing in the way of the city gas-light, it deprived the depot and its approaches of the light necessary to securely guide the passengers who desired to take the train, and to occupy that identical coach. It is not proper management in a

railroad company to require passengers to go through a series of coaches, and to pass over several platforms, in order to reach the particular coach which they may desire to occupy, because that coach is left outside of the depot yard which contains the balance of the train to which it is attached. *Turner v. Railroad Co.*, 37 La. Ann. 648.

OMISSION TO PROVIDE SUFFICIENT LIGHT. The management of the company, on the night of the accident, including the distribution of the lights around the station, the location of its train, with the most important coach left standing outside of the depot yard, thus blocking up an important thoroughfare, and shutting out the best light around the premises; its omission to provide sufficient lights on the right-hand side of the train, particularly at the end of the sidewalk pavement hereinabove described; its omission to instruct, by servants or other employes, its passengers as to the safest course to pursue in order to reach the sleeping-car of the train—are so many distinct and reprehensible violations of the rule recognized as indispensable to the safety of travelers, and so uniformly enforced, in jurisprudence, and which requires railway companies to furnish safe and proper means of ingress and egress to and from trains, platforms, stations, approaches, etc., and “to furnish, at night, ample and sufficient lights to safely guide their passengers to and from such trains, platforms, stations, approaches,” etc., and which, under those circumstances, exacts the obligation of procuring the employes and other servants necessary to inform passengers of the exact location of their trains, and to instruct them as to the safest mode of reaching same. *Peniston v. Railroad Co.*, 34 La. Ann. 777, and authorities therein cited.

The courts of last resort, in most of our sister States, have, with remarkable uniformity, rigorously enforced the rule, particularly in the intended and humane protection of persons whose business or other wants required their presence around railroad stations at night. While it is true that the rule is intended to afford protection to the public in general, it stands to reason, and it is consonant with justice, that it should apply with exceptional fitness to passengers on the trains of the company, or at its stations with the object of boarding one of its trains.

REVIEW OF THE LAW. A lucid writer on railroad jurisprudence has formulated the rule as follows: “It is also the duty of railway companies, as carriers of passengers, to provide platforms, and other reasonable accommodations, for such passengers, at the stations upon such roads at which they are in the habit of taking on and putting out passengers. Their public profession as such carriers is an invitation to the public to enter and to alight from their cars at their stations; and it has been held that they must not only provide safe platforms and approaches thereto, but they are bound to make safe, for all persons who may come to such stations in order

to become their passengers, or who may be put off there by them, all portions of their station grounds reasonably near to such platforms; and, for not having provided such station accommodations and safeguards, railroad companies have frequently been held liable for injuries to such persons." *Hutch. Carr.* 417, 418.

Another writer on the same subject has very succinctly traced a limit to be followed by railway carriers, as follows; "It is the duty of the corporation to have its stations open and lighted, and its servants present for the accommodation of those who may wish to leave its trains, or to depart by the same." *Thomp. Carr.* 108.

Numerous decisions of courts of last resort have contributed the material for the rules thus formulated, and it may not be amiss to refer to a few of such adjudications.

A passenger waiting for a train found the station so uncomfortable, by reason of tobacco smoke, that she undertook to enter the cars before they were drawn up to the platform from which passengers generally entered them, and by reason of which she was injured, recovered damages for such injuries. *McDonald v. Railroad*, 26 Iowa, 124.

In another case damages were allowed to a person who intended to board a train, and who was injured while running along the line of the road to reach the train in time, on account of darkness. *Martin v. Railway*, 16 C. B. 179.

It has also been held that "when, by reason of the insufficiency of the station, or length of the train, or negligence in the operation of it, passenger cars are brought to a stand at places where there is no landing or other conveniences for getting off the train, if it is reasonable to suppose that no better opportunity will be granted for this purpose, the passenger may alight, although the position is inconvenient or slightly dangerous. If the company's servants have given the passenger an express invitation to alight, or their conduct is such as to imply an invitation, the passenger will be justified in making the attempt." *Thomp. Carr.* 268, §4, and authorities cited by him.

The following rule also rests on undisputed judicial sanction: "Wherever a railroad company is in the habit of receiving passengers, whether at a station or some point outside, or if by the regular operation of trains it is necessary to traverse portions of the premises outside of the station-house, passengers have a right to assume that such parts of the premises are in a safe condition for such purpose, even on a dark night." *Thomp. Carr.* 269, and authorities therein quoted.

In the case of *Railroad Co. v. Thompson*, *ante* 541, the Supreme court of Mississippi, in sustaining a verdict of \$15,000 damages against this very company, for injuries sustained in one of their station yards by a person who had gone there on business, and was hurt while passing through a gap in a freight

train, usually open for people to pass through, used the following vigorous language: "Appellant is answerable for damages in the cause, unless a railroad company, in the prosecution of its business, may set a trap for people, and after a man has been caught in it, and killed or injured, escape liability by assuming the position that he ought to have had more sense than to have been deceived or misled by the contrivance."

In the instant case the record shows that, during the winter months, one or more of the night-train coaches were not pulled in the depot yard, but were left standing across the intersecting street; that trains were entered indifferently on the right and left hand sides thereof; that the sidewalk wooden pavement, which was flush with the station platform, had been constructed by the defendant company as part of the considerations for the franchises obtained by it from the city; and no evidence shows that the control of the same has ever been resumed by the city. *Quimby v. Boston & M. R. Co.*, 69 Me. 340.

It also appears that the sidewalk in question is one of the important immediate approaches to the company's station, it being used as the only place for the handling of the railroad baggage; that it afforded the most direct route for plaintiff to reach the sleeping car; and that no servant of the company informed him otherwise, whereas a large gate, wide open, gave him free access to it. All these circumstances must be construed as an invitation and an inducement, held out to him by the company, to use the sidewalk as he did. He is therefore fully justifiable in law for having followed the course which was thus so naturally suggested to him by the acts, omission and commission, of the company. Hence he is not amenable to the charge of contributory negligence; and the facts herein recited lead, on the other hand, to the clear conclusion that the company must be held responsible for the accident.

But we do not feel warranted to favor plaintiff's prayer for an increase of damages. The verdict of a jury fixing a quantum of damages must not be disturbed on appeal, unless it be manifestly erroneous and palpably inadequate. The evidence on this point in the record does not justify such a conclusion. Hence the verdict must remain unchanged. Judgment affirmed.

FENNER, J. (*dissenting*).—With due respect to the able and vigorous opinion adopted by the majority of the court, I am unable to assent to its conclusions. At its station in Vicksburg, Mississippi, the defendant railway company had provided depot grounds, with appropriate buildings, for the reception and accommodation of passengers, which were lighted and wholly inclosed by a substantial fence to designate the boundaries of the company's premises. Through this inclosure, by an opening in the fence just wide enough to admit the train defendant's tracks ran.

PLAINTIFF NOT
GUILTY OF CON-
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One side of defendant's inclosure was bounded by Levee street, a public street of the city of Vicksburg, running toward and extending to the railroad; and outside of the inclosure, and running along the fence, was the sidewalk or *banquette* of the street, which was an elevated wooden structure, built by defendant under direction and instructions of the city authorities, and forming the public highway for foot passengers. This sidewalk intersected and crossed the railroad outside of defendant's grounds. Arriving to take the train, plaintiff entered defendant's inclosure through a gate in the fence on Depot street at a point near the corner and furthest away from the track, and went into the passenger waiting-room, where he awaited the arrival of the train.

What was the plain significance of this inclosure, and of this waiting-room within it, fronting the railroad track? What was the object of them, and why did plaintiff enter them? Obviously for the purpose of awaiting and boarding the train. Would any one have supposed, under such circumstances, that he was expected, in order to board the train, to go back to the gate by which he had entered, and then approach the train by the public street? I think not. The train arrives. The engine and several passenger coaches enter the inclosure, and halt in front of the waiting-room, but the sleeper and part of the coach immediately in front of it are left outside the fence. What was the course plainly indicated to the waiting passengers? Clearly, to go forward to the train, and there to enter one of the coaches, and pass back to the sleeper, or else to have sought information as to how to reach the sleeper. Such was the plain invitation and inducement held out by the company. If, on reaching the train, and passing along it toward the sleeper, he had encountered an open gate at the track, and had passed through it, and been hurt, he might claim that such an open gate at such a point, with the sleeper beyond it, was an inducement or invitation held out by the company to pass through it. But plaintiff went away from the train to a gate more remote from the track than the waiting-room, entered the public street, and chose to pass to the train by that route outside of the company's grounds. In so doing, I consider he acted on his own responsibility, in opposition to the plain course dictated by the surrounding circumstances, and passed out of the company's protection, which was no more responsible for his safety than for that of any other passer on that public sidewalk. The complaint made of absence of employés to give directions has no force. No directions were necessary to prompt a passenger, in a waiting-room thus inclosed, to pass to the train which has halted in front of him, and within the inclosure, for the purpose of boarding it. The gate to which plaintiff went was the passage-way for arriving as well as departing passengers, and for all persons going in or out of the inclosure on that side; and had any employé been there he would

naturally have taken plaintiff to be an arriving passenger or other person going away from the depot.

If it were negligence in defendant to halt its train in such manner as to leave its sleeper outside the inclosure, and thus to require its passengers to enter another car, and pass through it to reach the sleeper, that might render it liable for accident happening in such passage; but it has no casual connection with an accident resulting from the unusual course pursued by plaintiff in this case, which was in evident opposition to that contemplated by defendant, and indicated by all the surrounding circumstances. I consider the law well settled that when a party disregards the sufficient provisions made by the railway company for ingress and egress to and from its trains, and chooses to adopt a different method, he does so at his own risk. As was said in a leading case: "We hold, on these principles, that the company's liability could not be fixed for the injury consequent on the choice of a passenger, in disregard of the provisions made by it for his safety and convenience. It was not negligence on the part of the company that it did not, by force or barriers, prevent the parties from leaving on the wrong side. People are not to be treated like cattle. They are presumed to act reasonably in all given contingencies, and the company had no reason to expect anything else in this case." *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318, and 37 Pa. St. 420.

These principles are fully applicable here, where the company had actually provided barriers within which plaintiff had been received for the purpose of entering the train, from within which he could have entered it, and was manifestly expected and intended to enter it. Plaintiff's act in going out of those barriers, and seeking to get to the train by the public street, was a voluntary disregard of the provisions made by the company, and the consequent injury should not be attributed to the company.

LOUISVILLE, N. O. AND T. R. Co.

v.

MASK, Adm'x.

advance Case, Mississippi. May 2, 1887.)

The fact that a juror is in the employment of the defendant disqualifies him.

That part of section 1661 of the Code of 1880, which provides that "it shall be a good cause to challenge any tales juror that he has served as such in the trial of as many as three cases at that or the last preceding term of the court," does not apply to a member of the regular panel for the week.

Where a passenger on defendant's train left his seat as the train approached his station, with a view of getting off, and went to the rear platform, whereupon the conductor, looking into the car, failed to see him, and, supposing that he had got off, omitted to call the name of the station, and ordered the train, which had not stopped, to move on, whereby the passenger was compelled to alight some five or six hundred yards beyond his station, and in consequence incurred injuries from which he died, *held*, that the company was liable in more than nominal damages.

APPEAL from circuit court, Coahoma county.

Appellee's intestate, Mask, purchased a ticket and became a passenger over appellant's road from Memphis to Lulu, a station near which he lived. There was another passenger on the train for the same station. When the train neared Lulu, between 12 and 1 o'clock at night, Mask and his fellow-passenger left the car and went to the back platform, so as to be ready to get off when the train stopped. When the station was reached the conductor of the train went to the coach in which Mask had been seated, and, not seeing him and the other passenger, supposed they had gotten off, and started the train on. The train had gone some 500 or 600 yards when it was stopped, and the two passengers got off. They did not ask to be taken back to the station. A horse had been sent to Lulu, the station, for Mask; but he did not return to the station, but walked home by another route. The night was bitter, cold, and disagreeable; the road which he walked was almost impassable, and it took him two hours or more to get home; and from the exposure to which he was thus subjected he was taken sick, lingered about a year, and died. His administratrix brought this action for actual damages which he suffered. On the trial plaintiff (appellee), when the jury was presented, challenged one Hartgroves for cause, that he was an employé of the railroad. The court sustained the challenge, and defendant excepted. When the jury was presented to the defendant (appellant), one Young was challenged for cause, that he had served as a juror at the last term of court, and participated in the decision of three or more cases. The court refused to sustain the challenge. Section 1661 of Code of 1880, after defining who are competent jurors, says: "But it shall be a good cause to challenge any tales juror that he has served as such in the trial of as many as three cases at that or the last preceding term of the court." The trial resulted in a verdict and judgment of \$1000 against the railroad company, from which it appealed.

W. A. Percy for appellant.

Cutrer & Cutrer for appellee.

ARNOLD, J.—The juror Hartgroves, being in the employment of appellant, was subject to challenge for that cause. He was not *omni exceptione major*. He would have been disqualified at com-

mon law, and we have no statute removing such disqualification.

DISQUALIFICATION OF JUROR. It does not matter that he had the self-confidence to swear that he could try the case impartially. It was not for him to determine his competency on that point. When the fact was developed that he was in the employment of appellant, the law adjudged him incompetent. The law does not lead jurors into the temptations of a position where they may secure advantage to themselves by doing wrong, nor permit the possibility of the wavering balance being shaken by self-interest. *Hubbard v. Rutledge*, 57 Miss. 7; 3 Bl. Comm. 365; *Thomp. & M. Jur.* § 185.

The cause assigned for the challenge of the juror Young was without merit. That part of section 1661 of the Code which furnishes cause of challenge to tales jurors did not apply to him. He was not a tales juror, but a member of the regular panel for the week. A tales juror is one added to a deficient panel, so as to supply the deficiency. *Bouv. Law Dict.*

NAMES OF STATIONS MUST BE ANNOUNCED AND TRAIN STOPPED. No principles of law are better settled than that a railroad company, carrying passengers, in order to afford them opportunity to leave the train at their places of destination, is bound to have the names of different stations announced upon the arrival of the train, and then to stop the train for a sufficient length of time for passengers to get off with safety, and that a railroad company is liable for the loss or injury which may result to a passenger for a violation of this duty. *Thomp. Carr.* 226; *Railroad Co. v. Scurr*, 59 Miss. 456; *Southern R. Co. v. Kendricks*, 40 Miss. 374.

It is not pretended that the name of the station at which Mask was to get off was announced when the train arrived at that point. Some of the witnesses say that the train was stopped, while others say it was not; and there is no explanation why Mask, who left his seat and went to the platform to get off, did not do so, if the train was in fact stopped. In this conflict of testimony it was for the jury, and not for the appellate court, to determine the truth of the matter. *Vicksburg Bank v. Moss*, 63 Miss. 74.

The circumstances that as the train approached the station, and its speed was reduced, Mask, with a view of getting off, left his seat, and went to the rear platform of the passenger car, and closed the door after him, and that the conductor afterward went to the front door or into the coach, and, not seeing Mask and his companion, supposed they had left the train, and thereupon ordered the train to move on, do not relieve the company from liability. It was the duty of the conductor to know that he had passengers for that station, to have the name of the station announced, and to stop the train. He had no right to assume, because he did not see Mask and his companion in the passenger coach, that they had

leaped in the dark from the moving train. Such risk is not generally taken. Sane and prudent people do no such thing.

The facts in evidence did not warrant exemplary damages, and they were not asked or awarded. Whether the injury complained of resulted from the failure of the company to stop its train, and what actual damages were proved, were questions for the jury, and not for this court to decide. The testimony produced by appellee on these points was competent, and we are unable to say that it was not sufficient to justify and support the verdict.

The action of the court in regard to the instructions is free from error. The instructions given could not well have been more favorable to appellant. The modification of its second instruction was proper. If appellee was entitled to recover anything, it was more than nominal damages. Affirmed.

ST. LOUIS, I. M. AND S. R. Co.

v.

PERSON.

(*Advance Case, Arkansas. June 4, 1887.*)

In an action against a railroad company by a passenger, to recover damages for personal injuries, instructions to the effect that if the plaintiff purchased a ticket to a regular station on defendant's road, and entered its train for the purpose of being carried there, and that, by reason of the failure of the conductor of said train to keep the cars at a stand-still a reasonable length of time to enable plaintiff to leave the cars in safety, the plaintiff was injured, without negligence on his part, the defendant is liable therefor; that if said train, after stopping at said station, started before the plaintiff could alight, and plaintiff, obeying the conductor's orders, attempted to get off while the train was going slowly, and the danger was not apparent, he was not guilty of such contributory negligence as would bar a recovery; that, if the plaintiff was directed by the conductor or agent of the defendant to get off while the train was moving, he had a right to rely upon said direction, provided he took no more risk than a prudent man would have taken under the same circumstances, and in so doing he would not be guilty of contributory negligence; and that where the danger of alighting from a moving train is not apparent to a passenger, and he is urged to take the risk by the company's employé, whose duty it is to know the danger, his conduct is not negligent,—correctly state the law as to carriers of passengers and contributory negligence.

In an action for personal injuries caused by alighting from a train in motion, at the direction of the conductor, a refusal to instruct the jury to find for the defendant if they believed, from the evidence, that, after the train had stopped at the station for a reasonable length of time to enable plaintiff

to alight, he failing to ~~so~~ alight, leaped from the train while in motion, and in so doing was injured, is not error because it seeks to make circumstances, of which the negligence is to be determined by the jury, negligence *per se*.

APPEAL from circuit court, Pulaski county.

The complaint charged that on December 25, 1884, plaintiff was a passenger on defendant's train on his journey from Little Rock to his home at Mablevale; that the conductor of the train failed to stop his train at Mablevale a sufficient length of time to enable plaintiff to get off safely, but at the same time pressed and urged the plaintiff to get off while the train was in motion; and by reason of the darkness of the night, and the train having passed the platform, plaintiff, in getting off, fell and broke his leg; whereby he suffered great pain, etc., to his damage \$5000. The answer denied specifically all of the allegations of the complaint, and charged contributory negligence on the part of the plaintiff.

The court gave the three following declarations of law, over defendant's objections, properly saved, to-wit: "(2) The court instructs the jury that if they believe, from the evidence in the cause, that the plaintiff, at the time stated in his complaint, had purchased from the defendant company a ticket from Little Rock to Mablevale station, and entered its regular passenger train for the purpose of being carried there, and that said Mablevale was a regular station upon the line of railway, where passengers are accustomed to get on and off its trains, then it was the duty of the conductor of such train to stop the cars at said station, and keep them at a stand-still a reasonable length of time, sufficient to enable the plaintiff to leave the cars in safety. And if the jury further believe, from the evidence in this cause, that the conductor failed to comply with his duty in that behalf, and that, by reason of such failure, the plaintiff, while attempting to get off such train at said station, was injured without any contributory negligence on his part, the defendant is liable therefor, and the jury find for the plaintiff. And the court further instructs the jury that if they believe, from the evidence in this cause, that upon arriving at said station the train was stopped, but, before the plaintiff was able to alight therefrom the train was started up again, and that the plaintiff was ordered by the conductor to get off, and under such directions attempted to do so while the train was going slow, and the danger of so doing was not apparent, the plaintiff had a right to rely upon the conductor's judgment, and his obeying such direction was not such contributory negligence as would bar his recovery. (3) If the jury find, from the evidence that the plaintiff was ordered or directed by the conductor or agent of the defendant to get off the train, he had a right to rely upon such advice or direction, provided he took no more risk in getting off the train than a prudent man would have taken under the same

circumstances. (4) If the jury find that the plaintiff took no more risk than a prudent man would under the circumstances, he was not guilty of contributory negligence."

The court gave several instructions as asked by defendant, only one of which we here copy, to-wit: "(1) If the jury believe, from the evidence, that the plaintiff jumped off the train after it had begun to move away from the station at Mablevale, and the night was so dark that he could not see whether there was a safe place for him to alight, and that he did this voluntarily, and for no other reason than because he did not wish to be carried past his station, and that a man of ordinary prudence would not so have jumped, they are authorized to find that the injury was caused by the contributory negligence of plaintiff, and he cannot recover."

But the court refused to give the fifth declaration as asked by defendant. It reads as follows: "(5) If the jury believe, from the evidence, that the train was stopped at the station a sufficient length of time to enable the plaintiff, by the exercise of reasonable diligence, to have alighted; that, failing to do so, he leaped from the train after it had started, and while it was in motion, and was thereby injured—they will find for the defendant."

The court on its own motion, over defendant's objection, gave the jury this further instruction, to-wit: "(1) Where the risk or danger of alighting from a moving train is not apparent to the passenger, and he is urged to take the hazard by the company's employé, whose duty it is to know the danger, his conduct will not be regarded as negligent. Where the danger is obvious, but slight, he has the right to rely upon the judgment of the conductor, whose duty and experience he may presume give a superior knowledge of such matters, and so justify an act which would otherwise be negligent. If the motion of the train was so slow that the danger of jumping off would not be apparent to a reasonable person, and the plaintiff acted under the instructions of the manager of the train, then the resulting injury was not caused by contributory negligence or a want of ordinary care." Ordinary care, in the case, was defined to be that degree of care which may have been reasonably expected from a sensible person in the passenger's situation. A passenger cannot throw the responsibility of his own wanton and unreasonable acts upon the company merely because the conductor has directed it.

The jury awarded the plaintiff \$865 damages. A motion for a new trial was filed, and overruled, and an appeal prayed.

Dodge & Johnson for appellant.

W. L. Terry and *T. E. Gibbon* for appellee.

COCKRILL, C. J.—Counsel for the appellant have not undertaken to point out any ground of objection to any part of the court's charge to the jury. The instructions given at the instance of the

plaintiff in the action, and by the court of its own motion, either announce familiar principles of law as to the duty of a carrier of passengers to stop and allow reasonable opportunity to the passenger to alight upon the platform provided for the purpose, or else state the law of contributory negligence applicable to the facts of the case almost in the language used or approved by this court when discussing the principles that control similar cases. *St. Louis, I. M. & S. R. v. Cantrell*, 37 Ark. 522; *St. Louis, I. M. & S. R. v. Rosenberry*, 45 Ark. 261; *Little Rock & F. S. R. v. Atkins*, 46 Ark. 423.

The court granted all the appellant's requests for instructions as asked, except one, which it rejected. The refusal to instruct the jury as asked in this particular is the only objection made to any ruling of the court at the trial that has been specifically pointed to as error. The request was this: "If the jury believe, from the evidence, that the train was stopped at the station a sufficient length of time to enable the plaintiff, by the exercise of reasonable diligence, to have alighted; that, failing to do so, he leaped from the train after it had started, and while it was in motion, and was thereby injured, they will find for the defendant." Without this, the charge of the court fairly covered every phase of the case. It had been explained to the jury that a passenger could not throw the responsibility of his own reckless or unreasonable conduct upon the company merely because the conductor had requested or directed him to hurry off; but they were told that if the motion of the train was so slow that the danger of alighting would not be apparent to a prudent man, and the plaintiff, in getting off, acted under the instructions of the conductor, who, they were informed, was presumed to know the hazard of the act better than the plaintiff, the latter would be exculpated from negligence, and the blame for the injury could not be visited upon him. The reasonableness of the train's stop, and the duty of the passenger to alight without necessary delay, were also impressed upon them. These features of the case are all that can be said to be covered by the request that was rejected. But it was proper to reject it independent of that consideration. Whether the plaintiff was negligent in getting off promptly, or in getting off at all, while the train was in motion, were questions of fact, to be determined from all the circumstances in proof; but the rejected prayer sought to make it negligence *per se*, and in itself inexcusable, for the plaintiff to undertake to alight from the train while it was in motion, and it was not an expression of the law upon the subject.

The evidence was conflicting, and we cannot say that the jury were not justified in the conclusion they reached. Let the judgment be affirmed.

See *Dorrah v. Illinois Central, etc., R. Co.* and note, *infra*.

SIMMS and Husband

v.

SOUTH CAROLINA R. Co.

(Advance Case, South Carolina. September 20, 1887.)

Whether or not, in a particular case, due care was exercised, is for the jury to determine; and, therefore, in an action for injuries received by plaintiff in alighting from defendant's train, a charge that it is the duty of the conductor to assist passengers from the train is erroneous.

In such action it is also error to charge that it is the especial duty of the conductor to assist from the train any passengers who are "aged, helpless, and infirm."

The standard of due care and caution on the part of one charged with contributory negligence is that ordinarily exercised by a prudent and reasonable man in possession of the ordinary sense and capacities, and one physically deficient is required to exercise caution and prudence in proportion to his defect.

The court charged a general proposition, and the appellant complained that it was without qualification, but the desired qualification was not brought to the attention of the court at the time of the charge. *Held*, that that an exception based thereon would not be considered on appeal.

APPEAL from circuit court, Berkeley county; Witherspoon, Judge.

SIMPSON, C. J.—This case involves that perplexing question, negligence, and it arises out of the following general facts: The respondent was a passenger on the appellant's railroad FACTS. from Charleston to Summerville, the latter point being her destination. As the train approached Summerville the conductor called out "Summerville," and the passengers destined to that place prepared to disembark, the respondent among them. After stopping and remaining, as it is alleged, the usual time, the train moved on. As it began to move forward, the respondent, who was on the steps or platform of the rear car, preparing to alight, perhaps becoming alarmed or agitated, jumped from the moving car, fell, broke her arm, and was otherwise injured, for which injury the action below was instituted, alleging negligence in the employees of the company.

At the trial various requests to charge were made to the presiding judge, both by the respondent (plaintiff), and the defendant (appellant), most of which his honor charged, and there being no appeal from several of them, it will not be necessary to mention or consider them all. In addition to responding to these requests,

his honor made a general charge covering the whole case, which in the main was entirely fair, just, and legally correct. There was, however, in our opinion, one important error, which is fatal to the judgment rendered, and which necessitates a new trial.

The first exception of appellant is as follows: "Because his honor erred in charging the jury that it was the duty of the conductor to assist the passengers out of the train." His honor

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in discussing the legal propositions involved, among other things, said: "If he, the conductor, gave her [the plaintiff] sufficient notice, on approaching the station, that that was her point of destination, it was her duty to have got ready to have got out, and it was his duty to assist the passengers out, especially any that were aged, helpless, and infirm. Did he assist the passengers out, or was he careless in his duties on that occasion?" etc. Inasmuch as it was apparent from the testimony that the conductor did not assist the plaintiff in alighting from the car, by any personal and direct act of assistance, the jury under this charge could not have done otherwise than find for the plaintiff, because here was an announcement by the judge that the law required such assistance to be rendered, and consequently that the absence of such assistance was negligence. Negligence, as we understand it, is in the main a question of fact, or rather whether it exists or not in a special case is a question of fact for the jury. All that the law has ever determined on the subject is that it consists in failing to bestow due care to the matter in hand—failing to do that which due care requires to be done, or doing that which said care forbids. This is about all that a judge can ordinarily say to the jury as to the law of negligence. Whether the facts proved show the absence of this care is for the jury, untrammelled by any expression of opinion from the judge. Now, it seems to us that his honor here went beyond this rule when he charged the jury, as matter of law, that it was the duty of the conductor to assist the passengers off. He ought to have left this to the jury. It was their province to say whether failing to assist the plaintiff, under the circumstances surrounding her and him, the conductor failed to bestow that care which the matter reasonably demanded at his hands.

The appellant excepted, secondly: "Because his honor erred in charging the jury that it was the duty of the conductor to especially assist the passengers out who were 'aged and helpless and infirm,' without the necessary qualification that notice of such age, helplessness, or infirmity must be brought home to the conductor by the passenger, or the conductor be proven to have had knowledge of the same."

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Negligence, as we have said, being defined in law to be the absence of due care, it is of course a relative matter, and therefore, what would be negligence in one case might not be so in another.

But the whole question, where the case escapes a demurrer or nonsuit, is for the jury upon all the testimony. And inasmuch as we think it was error for the judge to charge, as he did, that it was the duty of the conductor to personally assist the plaintiff in attempting to leave the car, this error would not have been cured, even if the qualification suggested had been made. What we desire to be understood as saying is this: That the fact that a conductor fails to assist a passenger in disembarking from the car cannot be laid down in law as constituting in itself negligence, but it is a fact which may go to the jury, with the other facts, including a want of knowledge on the part of the conductor of the age and infirmity of any passenger, as circumstances for them to consider in determining the question whether due care had been observed or not. And it is the province of the jury to decide the force and effect of such testimony, and not for the judge.

The third exception complains: "That his honor erred in charging the jury, without qualification, that the reasonable time which it was the duty of the defendant to give passengers THIRD EXCEPTION. upon stopping to alight from its train at any station, must be in reference to the person; whether it be a child, or a hale man, an aged person, or decrepit person, they must have time with reference to their physical condition." The qualification deemed necessary is not mentioned, nor does it appear that the attention of the judge was drawn to any especial qualification desired by appellant. There is no complaint because of the fact that the judge charged the general proposition as to reasonable time; it is only that this proposition was charged without qualification, but the qualification desired was not requested at the time of the charge. We therefore pass this exception by.

The fourth and last exception refers to contributory negligence. The defendant requested the judge, in substance, to charge that what would be due care in one, so as to shield him CONTRIBUTORY NEGLIGENCE. from contributing to his own injury, might not be so as to another; that this matter depended upon the condition of the person. In other words, that what might not be an imprudent or rash act, looking to its consequences, in one in the full possession of his physical and mental faculties, might be so in one deficient in this regard. In the case of *Renneker v. Railroad*, 20 S. C. 219, Mr. Justice McGowan, in delivering the opinion of the court, announced what we think is the correct principle in such cases, as follows: "Where the rights and obligations of one party are made to turn upon the proper caution of another, it would seem that there should be some common standard by which to test the fact, and we know of none more practicable, other than that of a prudent, reasonable man in possession of the ordinary senses and capacities. When arrangements are made suitable and proper for such persons, nothing more should be required, and one falling

below this standard, either physically or mentally, should be cautious and prudent in proportion to such defect. Railway companies, though held to a high degree of care, do not insure the safety of passengers under all circumstances."

It is the judgment of this court that the judgment of the circuit court be reversed.

McGOWAN, J. concurs.

McIVER, J.—I concur in the result. I do not understand that there is any legal duty resting upon the conductor of a railway train to assist the passengers in leaving the cars. It is true, in one sense of the word it may be the duty, not only of the conductor, but also of any gentleman standing by, to assist a lady, or an infirm person, in leaving the cars, but that is not such a duty as a court of law takes cognizance of, or undertakes to enforce, but rests rather on considerations of politeness or humanity. I am not prepared, therefore, to say that the failure of a conductor to assist a passenger in leaving the cars is one of the circumstances to be considered by the jury in determining the question of negligence.

See *Dorrah v. Illinois Central R. Co.*, and note *infra*.

NORFOLK AND W. R. Co.

v.

PRINNELL *et ux.*

(*Advance Case, Virginia. 1887.*)

A verdict will not be set aside on the ground that it is contrary to the law and the evidence, unless it is shown by the plaintiff in error that, after he has waived all of his own evidence, merely oral, and giving full force and credit to that of his adversary, the verdict is still erroneous.

Where a station has been announced, the train stopped at the accustomed place, and a passenger, who was descending the steps in the act of alighting, was thrown down either by the sudden jerking of the car or its unexpected forward motion, *held*, that plaintiff, being on the platform in response to the defendant's invitation to alight, was guilty of no negligence; and the defendant, having violated its duty by moving the train when the plaintiff had a legal right to assume that it would remain stationary, was guilty of negligence for which an action would lie.

APPEAL from circuit court, Wythe county.

HINTON, J.—This is an action of tort, which was submitted to

the jury under instructions eminently favorable to the defendant, and the jury have rendered a verdict, in which they have assessed the damages of the plaintiff at \$950, a sum which, under the circumstances of the case, cannot be said to be excessive. Upon the case, as it is presented to us, the only question upon which we are called to pass is whether the circuit court erred in refusing to set aside the verdict, and grant a new trial, upon the ground that the verdict is contrary to the law and the evidence. That question is presented upon a certificate of evidence; and, under the established rule of this court, the plaintiff in error must succeed, if at all, by showing that, after he was waived all of his own evidence, merely oral, and giving full force and credit to that of his adversary, the verdict is still erroneous. *Dean's Case*, 32 Grat. 913; *Taylor's Case*, 77 Va. 696; *Jones v. Rixey*, 79 Va. 659.

Confining ourselves, therefore, to evidence of plaintiff below, the case made by the record is plainly this: At the time of the accident the whistle of the engine had been sounded for the station Rural Retreat. The name of the station had been FACTS. announced to the passengers, presumably, because there is no evidence throwing doubt upon the point, by the person whose duty it was to perform that service. The train had come to a stop, and the plaintiff, Judy Prinnell, was on the bottom step of the platform of the cars, "in the act of getting down, when the train started forward with a sudden jerk," which threw the plaintiff down, and injured her spine. Under such circumstances, if we may not be permitted to declare, as matter of law, that the party injured is entitled to recover, about which I am not entirely satisfied, yet it is perfectly clear that if such party prevail before the jury, that he should be allowed to retain his verdict.

The principles of law applicable in such cases are perfectly familiar, and in accord with the dictates of justice and common sense. The company having undertaken to carry the passengers, the duty at once arises, and the obligation is cast upon the company, of carrying him or her to the place of destination in safety. As was said by Black, C. J., in the case relied upon by the defendant: "Railroad companies must carry the passengers to their respective places of destination, and set them down safely, if human care and foresight can do it." *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 149. And, from the consequences of a failure to discharge its duty in this respect, the company can only be relieved by the conduct of the passenger in failing to exercise the measure of care and prudence required of him. The implied contract to carry safely includes the duty of giving the passengers reasonable opportunity to alight in safety from the train, and a violation of this part of the company's duty is culpable negligence for which an action will lie. *Thomp. Carr.* 227.

In the case at bar, the announcement of the station, and the

stopping of the train at the place where passengers were accustomed to disembark, was naturally and properly construed by the plaintiff as an invitation to her to alight, and she had the right to expect it would stop long enough to allow her to get off without danger. *Id.* 326, note 4. She was therefore guilty of no negligence in going out upon the platform, and in descending the step; and it is immaterial so far as the result is concerned, whether, after she had reached the last step, she was thrown down by the sudden jerking of the car, or by its unexpected forward motion. In either event, her injuries are directly traceable to the circumstance, for which the company is responsible, that the train was moved forward at a time when the plaintiff had the legal right to assume that it would be permitted to remain stationary. That the train was not moved forward so rapidly as to make her conduct in getting down at the time reckless, or even obviously dangerous, may be fairly inferred from the fact that it only ran about 100 yards further before it was stopped a second time.

It cannot be necessary to say more. We are unable to discover any evidence that the plaintiff was wanting in proper care and prudence, and the judgment must be affirmed.

See *Dorrah v. Illinois Central, etc., R. Co.*, and note, *infra*.

DORRAH

v.

ILLINOIS CENT. R. Co.

(*Advance Case, Mississippi. October 24, 1887.*)

A passenger, by reason of a failure to stop the train, was carried beyond the station for which he had purchased a ticket. *Held*, exemplary damages could not be recovered on proof of mental anxiety occasioned by the separation from his family, it not appearing that the failure to stop was wilful or attended with circumstances of malice, insult, or oppression.

APPEAL from circuit court, Madison county; T. Wharton, Judge.

W. G. Dorrah purchased a ticket over the Illinois Central R. from Jackson to his home at Madison Station. He took a train leaving Jackson between 12 and 1 o'clock at night. The train did not stop when it arrived at Madison Station, but carried the appellant on to Canton, where he remained till next morning at about

7 o'clock, when he returned to Madison Station. Dorrah suffered no special damage, but claimed that, on account of the loss of sleep, he was unable to work the next day. There was no explanation of the failure to stop the train at Madison Station. The court instructed the jury that, under the facts of the case, they should not award exemplary damages. A trial was had, which resulted in a verdict and judgment in favor of Dorrah for the price of his ticket from Canton back to Madison Station, thirty-five cents, and the value of his labor for one day, which Dorrah had stated on the witness stand was two dollars; and from this judgment Dorrah appealed.

Wm. Buchanan and G. W. Thomas for appellant.

W. P. & J. B. Harris for appellee.

ARNOLD, J.—It was obligatory on the railroad company to announce or give notice in some way of the name of the station on the arrival of the train at Madison Station, and to stop the train long enough for appellant to get off with safety, and the company was liable for any loss or injury sustained by him on account of this not being done. *Railway Co. v. Mask*, 64 Miss. —, 2 South. Rep. 360. Whether the failure of the train to stop at Madison Station resulted from inadvertence, or a wilful disregard of duty of and of appellant's rights, it is not shown by the record. There is no testimony on this point; but it does appear that no special injury or damage was done to appellant, and that the jury allowed him full compensation for the loss of time and expense incurred, by reason of his being carried beyond the place of his destination. In our judgment, this was the just and lawful measure of his recovery, and the court below committed no error in instructing the jury that exemplary damages should not be awarded. In order to have justified the infliction of exemplary damages, on proof of mental anxiety occasioned by separation from his family, it was necessary for appellant to have shown that the failure to stop the train was wilful, or that the wrong was aggravated in some manner by the railroad company or its employes. *Railroad Co. v. Scurr*, 59 Miss. 456; *Railroad Co. v. Scanlan*, 63 Miss. 413. Mental suffering is not readily distinguishable from physical suffering, and to become an element of damages it must be based on bodily injury, or the injury by which it is produced must be attended by circumstances of malice, insult, or oppression. *Pierce*, R. 302; *Johnson v. Wells*, 6 Nev. 224; *Wyman v. Leavitt*, 71 Maine, 227; *Bovee v. Danville*, 53 Vt. 183; *Canning v. Williamstown*, 1 Cush. 451; *Trigg v. Railroad Co.*, 6 Am. & Eng. R. R. Cas. 345.

Affirmed.

Calling Name of Station and Stopping Train.—It is the duty of the railroad company to announce to its passengers the names of the different
80 A. & E. R. Cas.—37

stations upon the arrival of the train, and to stop the train for a sufficient length of time to enable the passengers to get off with safety, and the company is liable for any injury resulting from a violation of this duty. *Dawson v. L. & N. R.*, 11 Am. & Eng. R. R. Cas. 134; *Southern R. Co. v. Kendrick*, 40 Miss. 374; *Imhoff v. Chicago, etc., R. Co.*, 20 Wis. 344; *Dickens v. N. Y., etc., R. Co.*, 28 Barb. (N. Y.) 41; *Penna. R. Co. v. Kilgore*, 32 Pa. St. 284; *Bucher v. N. Y. C., etc., R.*, 98 N. Y. 128; *W., St. L. & P. R. v. Rector*, 104 Ill. 296; s. c., 9 Am. & Eng. R. R. Cas. 264.

A reasonable opportunity must be given passengers to alight in safety from the train. *Fairmount, etc., R. Co. v. Stutler*, 54 Pa. St. 375; *Roberts v. Johnson*, 58 N. Y. 613.

Effect of Calling Name of Station when Train is Moving.—As to the effect of such an announcement, there is a difference of opinion.

In *Lewis v. London, etc., R. Co.*, L. R. 9 Q. B. 66, 71, Blackburn, J., said: "Calling out the name of the station, I understand, and have always understood, to mean this: That it is an intimation to all who are travelling by the train that the station at which the train is about to stop is that particular station. . . . Calling out the name of a station is not an invitation to alight." See also *Bridges v. North London R. Co.*, L. R. 6 Q. B. 377; L. R. 7 H. L. 213; 23 Week. Rep. 62. In the case just cited, Mr. Baron Pollock, in his opinion before the Lords (7 H. L. 224), concurred in the opinion of Mr. Justice Willes, delivered in the exchequer chamber, where, speaking of the effect to be given to calling out the name of a station, he said: "It is an announcement by the railway officers that the train is approaching or has arrived at the platform, and that the passengers may get out when the train stops at the platform." See L. R. 6 Q. B. 377. And in *Whittaker v. M. & S. R.*, L. R. 5 C. P. 464, note, Willes, J., said: "I cannot now understand how it could be said as a matter of law that the calling out of the name of a station was not an invitation."

Some cases hold that it is a question for the jury whether calling out the name of a station amounts, under all the circumstances, to an invitation to alight. See opinion of Bovill, C. J., in *Whittaker v. M. & S. R.*, L. R. 5 C. P. 464, note; *Scott v. Dublin, etc., R. Co.*, Irish Rep. 11 C. L. (N. S.) 377; *Nicholls v. Great Southern, etc., R. Co.*, Irish Rep. 7 C. L. 40.

When a station is called, the passengers have a right to infer that the first stop of the train will be at such station. *Central R. Co. v. Van Horn*, 38 N. J. L. 133. See generally, *Pa. R. v. White*, 88 Pa. St. 327; *Mitchell v. C. & G. T. R.*, 51 Mich. 236; s. c., 18 Am. & Eng. R. R. Cas. 176; *Brooks v. B. & M. R.*, 135 Mass. 21; s. c., 16 Am. & Eng. R. R. Cas. 345; *Edgar v. M. R.*, 4 Ont. (Can.) 201; s. c., 16 Am. & Eng. R. R. Cas. 347; *Penna. Co. v. Hoagland*, 78 Ind. 203; s. c., 3 Am. & Eng. R. R. Cas. 436.

Allighting at Stations.—The railroad company is liable for accidents happening to its passengers in alighting at a station from a car at rest, when the circumstances are such as to induce the passenger to believe that his point of destination has been reached, and that it is safe for him to get out. *Praeger v. B. & E. R.*, 18 C. B. (N. S.) 225, 114 E. C. L., 24 L. T. (N. S.) 105; *Weller v. L. B. & S. C. R.*, L. R. 9 C. P. 126; *Robson v. N. E. R.*, L. R. 10 Q. B. 371; *Cockle v. L. & S. E. R.*, L. R. 5 C. P. 457, 7 C. P. 321; *Bridges v. N. L. R.*, L. R. 7 H. L. 213; *Foulkes v. M. D. R.* 4 C. P. D. 267; 5 C. P. D. 157; *P. R. v. White*, 88 Pa. St. 327; *T. H. & I. R. v. Buck*, 96 Ind. 346; s. c., 18 Am. & Eng. R. R. Cas. 234; *Cartright v. C. & G. T. R.*, 52 Mich. 606; s. c., 16 Am. & Eng. R. R. Cas. 321; *Edgar v. N. R.*, 11 Ont. App. 452; s. c., 22 Am. & Eng. R. R. Cas. 433.

In *C. & I. C. R. v. Farrell*, 31 Ind. 408, the train came to a stop on a bridge over a culvert, and the railway servant called out the name of the station. A passenger, in alighting from the car at night, was injured. *Held*, that the railroad company was liable. So, where the platform of the

station was about two feet three inches below the door of the carriage, which had neither platform nor steps, and the passenger, in alighting after dark, fell and was injured, the railroad was held to be guilty of negligence. *Foulkes v. M. D. R.*, L. R. 4 C. P. D. 267, 5 C. P. D. 157.

In *Weller v. London, etc., R. Co.*, L. R. 9 C. P. 182, Brett, J., said: "I agree that to call out the name of the station before the train has come to a stand-still is no evidence of negligence on the part of the company. I also agree that merely overshooting the platform is not negligence. But if the porter has called out the name of the station, and if the engine driver has overshot the station, and the train has come to a stand-still, the company's servants are guilty of negligence if they do not warn passengers not to alight. At all events, the jury may from the facts infer negligence."

In *Praeger v. Bristol, etc., R. Co.*, 24 L. T. (N. S.) 105 (L. R. 7 C. P. 323), the train arrived at a dimly-lighted station on a dark night. The platform curved away from the track at the point where the carriage stood in which plaintiff was seated. A guard opened the door and said nothing. Plaintiff stepped out, expecting to alight on the platform, but fell between the carriage and platform and was injured. Cockburn, C. J., said: "He got out on the invitation of the guard, who opened the door, which implied an invitation to alight, and I think, also, to alight in safety."

When the Railroad Company is Not Liable.—Where, however, the passenger, by the exercise of reasonable care, can see that by alighting from the car he is encountering peril, the railroad company is not liable. *Lewis v. L. C. & D. R.*, L. R. 9 Q. B. 70; *Siner v. G. W. R.*, L. R. 3 Ex. 150; 4 Ex. 117; *P. R. v. Zebe*, 88 Pa. St. 318; 87 Pa. St. 420; *D. L. & W. R. v. Napheys*, 90 Pa. St. 135.

Where the passenger is aware that the car has reached the platform, and, without waiting to see whether it will be backed up, gets out in the dark and is injured, the railway company is not liable. *Harrold v. Great Western R. Co.*, 14 L. T. (N. S.) 440; *Lewis v. London, etc., R. Co.*, L. R. 9 Q. B. 66.

Assistance in Alighting from Train.—Where there is no platform at the stopping place, the employees of the company must assist passengers to alight, and for failure in so doing the company will be responsible to a passenger injured through no fault on his part. *M. & C. R. v. Whitfield*, 44 Miss. 466.

Carrying Passenger Beyond Destination.—A passenger who is carried beyond his destination by the railroad company is entitled to recover compensatory damages. *C., St. L. & N. O. R. v. Scurr*, 59 Miss. 456; s. c., 6 Am. & Eng. R. R. Cas. 341; *Trigg v. St. L., K. C. & N. R.*, 74 Mo. 147; s. c., 6 Am. & Eng. R. R. Cas. 345; *I. & G. N. R. v. Terry*, 62 Texas, 380; s. c., 21 Am. & Eng. R. R. Cas. 328.

Exemplary Damage—When Awarded.—Exemplary damages are imposed as a punishment to the offender for the act committed and as an example to others, and can be recovered only when the wrong has been done under circumstances showing wantonness, violence, fraud, malice, oppression, or willful misconduct, or that entire want of care which raises the presumption of a conscious indifference to consequences. *Pa. R. v. Kelley*, 31 Pa. St. 372; *Pa. R. v. Books*, 57 Pa. St. 839; *Chicago, etc., R. Co. v. Williams*, 55 Ill. 185; *Heirn v. McCaughan*, 32 Miss. 17; *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489; *Graham v. Pacific R. Co.*, 66 Mo. 536; *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282.

In *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456; s. c., 6 Am. & Eng. R. R. Cas. 341, plaintiff took passage at night on defendant's train from Grenada to Torrence. The conductor permitted the train to pass by Torrence without stopping, and plaintiff was carried eight miles beyond his destination, to Coffeeville. The night was cold, dark, and rainy. There was no claim for mental or physical suffering, except that plaintiff stated that while at Coffee-

ville "he suffered some from cold." The conductor's conduct throughout the matter was courteous. *Held*, that exemplary damages were not allowable, and that a verdict for \$2500, which was reduced by the court to \$838.33 was excessive. Chalmers, C. J., said: "Did the proof warrant the rendering of exemplary damages? By a long train of decisions in this State, which simply announce the rule everywhere recognized, such damages are permissible only where there has been some element of intentional wrong, or, in the absence of intention, a negligence so gross as to evince a reckless disregard of consequences. The idea is variously expressed by different text-writers and judges, and sometimes with a multitude of words; but if to the words 'negligence' and 'intention' we add the word 'insult,' we will perhaps sufficiently embrace all the states of case, in which such damages should be awarded by a jury, or sanctioned by a court. When the negligence of which a defendant has been guilty bears no aspect of recklessness or willfulness, and is wholly free from any element of insult or rudeness, there is no justification for the imposition of any damages beyond such as will fully compensate for all injuries actually sustained. . . . When the proof fails to show anything that will warrant an imputation of willfulness, recklessness, or rudeness, it is the duty of the court to inform the jury, when requested so to do, that they cannot inflict punitive damages." See also *Trigg v. St. Louis, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 345.

Where the railroad company has authorized the particular act, or subsequently has ratified it, either expressly or impliedly, by retaining in its service the employee whose act caused the injury, exemplary damages will be allowed. *M. & St. P. R. v. Arma*, 91 U. S. 489; *W. V. T. Co. v. Eyster*, 91 U. S. 495; *N. O., J. & G. N. R. v. Hurst*, 36 Miss. 660; *Goddard v. G. T. R.*, 59 Me. 202; *C. S. R. v. Steen*, 42 Ark. 321; s. c., 19 Am. & Eng. R. R. Cas. 30; *Cleghorn v. N. Y. C. & H. R. R.*, 56 N. Y. 44; *Hagan v. P. & W. R.*, 3 R. I. 88.

And it has been held that the company may be liable, in a proper case, in exemplary damages for injuries to passengers caused by their employees, without a direct authorization or subsequent ratification of the act complained of. See *Thompson's Carriers of Passengers*, 575; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Quigley v. Central Pacific R. Co.*, 11 Nev. 350; *Bass v. Chicago, etc., R. Co.*, 36 Wis. 450; *Chicago R. Co. v. Herring*, 57 Ill. 59.

In *Goddard v. Grand Trunk R. Co.*, 57 Me. 228, the court say: "We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur."

Exemplary Damages in Cases of Gross Negligence.—Some cases, however, hold that exemplary damages may be recovered where the injury is caused by gross negligence on the part of the railroad company. *Hopkins v. A. & St. L. R.* 36 N. H. 9; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304; *A. & G. W. R. v. Dunn*, 19 Ohio St. 162; *M. & M. R. v. Ashcroft*, 48 Ala. 15; *L. & N. R. v. McCoy*, 81 Ky. 403; s. c., 15 Am. & Eng. R. R. Cas. 277; *C. St. R. v. Steen*, 42 Ark. 321; s. c., 19 Am. & Eng. R. R. Cas. 30.

Rule of the Supreme Court of the United States.—But the better doctrine is that laid down by the Supreme Court of the United States in *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489. The court below charged the jury as follows: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiffs primitive or exemplary damages." *Held*, that the court had misdirected the

jury. Mr. Justice Davis said: "It is insisted that when there is 'gross negligence' the jury can properly give exemplary damages. There are many cases to this effect. The difficulty is that they do not define the term with any accuracy; and if it be made the criterion by which to determine the liability of the carrier beyond the limit of indemnity, it would seem that a precise meaning should be given to it. This the courts have been embarrassed in doing, and this court has expressed its disapprobation of these attempts to fix the degree of negligence by legal definitions. Some of the highest English courts have come to the conclusion that there is no intelligible distinction between ordinary and gross negligence. Lord Cranworth, in *Wilson v. Brett*, 11 M. & W. 113, said that gross negligence is ordinary negligence with a vituperative epithet; and the exchequer chamber took the same view of the subject. *Beal v. South Devon R. Co.*, 8 H. & C. 327. . . . 'Gross negligence' is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence;' but, after all, it means the absence of the care that was necessary under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the employees of the company did not use the care that was required to avoid the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train; and the court, therefore, misdirected the jury." See also *Kentucky, etc., R. Co. v. Dills*, 4 Bush (Ky.) 593; *Doss v. Missouri, etc., R. Co.*, 59 Mo. 27; *Thompson v. New Orleans, etc., R. Co.*, 50 Miss. 315; *Toledo, etc., R. Co. v. Patterson*, 63 Ill. 304; *Paine v. Chicago, etc., R. Co.*, 45 Iowa, 569.

HARRIS v. CENTRAL R.

CENTRAL R. v. HARRIS.

(Advance Case, Georgia. March 12, 1887.)

In an action to recover damages for death, resulting from the negligence of the defendant, it is proper for the court, even pending the introduction of evidence by the defendant, to permit an amendment to the declaration charging acts of negligence different from those originally relied upon, but not changing the cause of action, in order that the pleadings may conform to the evidence.

Whether, in a given case, due diligence requires that a train should leave on schedule time, or whether persons upon it not as passengers should alight from it before the time of departure fixed by the schedule, or whether when a train is starting, or about to start, the persons passing in front of it should see to it that the train is not moving, or about to move, and if so, what degree of diligence he should employ to ascertain whether it was starting, or about to start, are all questions of fact for the jury to determine.

The statute regulating the speed of trains at public crossings does not apply to cases in which the train is started at or upon the crossing.

Hearsay evidence of the fact of the killing of some one upon a certain day is admissible to show the date at which something else occurred, about which the witness has testified; but as evidence of the date of the homicide, or the fact that one has been committed, it is incompetent.

Evidence that at a former trial the defendant relied upon a different defense to the charge of negligent killing than that relied upon in the present trial is inadmissible.

The propriety of allowing a question which misrecites the testimony of the witness, and is calculated to lead him into error, is within the discretion of the trial court.

Where the record shows that a cross-bill of exceptions was signed upon the same, or nearly the same, date as the principal bill, it is in time though not sued out until more than 60 days after the trial.

Exceptions to city court of Atlanta; Van Epps, Judge.
Hoke & Burton Smith for plaintiff.
Henry Jackson for defendant.

BLECKLEY, C. J.—This was an action by a widow, to recover damages for the homicide of her husband. There was a verdict for the defendant, and a motion for new trial by the plaintiff, which was overruled. The judgment overruling the motion was rendered more than 60 days after the trial; notwithstanding which fact the defendant sued out a cross-bill of exceptions, complaining of a ruling of the court made on the trial. When the case was called here for argument, a motion was made to dismiss the cross-bill on the ground that it was sued out too late. Our decision on that point is that there was no right to a cross-bill until the principal bill had been signed; and that as the cross-bill was of the same date, or near the same date, as the principal bill, it was in time. The motion to dismiss the cross-bill of exceptions is overruled.

1. The matter of that cross-bill was the allowance of an amendment which was offered and made pending the introduction of evidence by the defendant. The amendment being to the declaration, the propriety or impropriety of allowing that amendment will depend upon the declaration as it stood before amendment. Looking to the original, we find that the substance of it was that the plaintiff's husband was killed by the running of the defendant's train, locomotives, cars, and other machinery. His death was the result of no negligence on his part, but was due to the negligence of the defendant. It was the result of failure by the defendant to use any of the precautions required of railroad companies at public crossings; and to use reasonable care to prevent injury to passers-by at Pryor-street crossing, where he was killed. An amendment prior to the one excepted to has been made, which alleged in substance this: The railroad crosses Pryor street, and goes to the end of the car-shed. The engine started on the edge of the sidewalk, and across the walk and street,

without ringing the bell or giving any sufficient signal of an intention to start. It started and ran too rapidly, and the circumstances were such as to require special care by the defendant; but the defendant failed to exercise ordinary care, or any care, and this negligence caused the homicide. The amendment finally made and the one excepted to, was in substance as follows: The defendant failed to furnish a safe way for egress from the cars, in this: it placed an iron rail around the platform of a car, and did not provide steps to another car next to the former, nor proper rails for the protection of persons on the steps. A number of persons were upon the latter car, bidding friends good-by. They were there by permission, express or implied, of the defendant, and were negligently urged by the defendant from the car, and while they were getting from it the train started, the conductor not allowing sufficient time for those persons to descend, nor did he stop the train or use any care to prevent an accident, though he saw a crowd endeavoring to get off, and saw that the plaintiff's husband, in climbing off the platform, had fallen between the cars, and was hanging to one of the posts of the railing. These acts were gross negligence on the part of the defendant, and caused the death of the plaintiff's husband, who was on the train by the defendant's permission, and was in the exercise of due diligence.

The cause of action was the homicide of the plaintiff's husband by the negligence of the defendant. In setting out that negligence, it was described in one way in the original declaration, in another by the first amendment, and in another by the second amendment. But it was all the same cause of action. It might be tested thus: Suppose it were lawful to amend indictments for murder, and you had an indictment for the murder of A, alleging that it was by shooting, and the proof disclosed that it was by stabbing, could an amendment alleging that it was by stabbing be thought to charge another and different crime? The crime in the supposed case would correspond to the cause of action in this. Would it be charging the defendant with another crime to add another count, or to allege in the same count that the death was the result of stabbing, or other means than shooting—the means first charged? We think not. There can be but one cause of action for the homicide of any one man, and all these variations went to the means and mode by which the homicide was perpetrated; and the present case is a good illustration of the propriety of at least a discretionary power of allowing such amendments; because, as the plaintiff understood her case and proved it, the homicide was the result of an occurrence at the crossing, separated altogether from the cars and the condition of the cars. But the defendant introduced evidence of which probably the plaintiff had no knowledge or information before, tending to show that the

‘ killing occurred in consequence of the husband being upon the train and attempting to get off, and exposing himself, or becoming exposed, while in the act of alighting. It would be a great hardship to make this action fail because of the difference and the doubt as to how the death really came to pass, provided that it was the result of defendant’s negligence. It was a proper case for amendment, and it would have been an abuse of the law of amendment had this amendment been disallowed. The cause of action alleged being the homicide of plaintiff’s husband by means of the defendant’s negligence, the allegations in the declaration touching the specific acts of negligence, and the manner of causing death may be varied or added to by amendment during the progress of the trial so as to adapt the pleadings to the evidence in all its aspects. In this case there was enough in the declaration to amend by, the amendment did not introduce a new cause of action, and it was not offered too late. On the cross-bill of exceptions, therefore, the judgment is affirmed.

2. Passing now to the main case, the first ground of the motion for new trial which we notice is that a witness was permitted to testify that another person told him at a certain station that the train had run over a man in Atlanta and killed him. This evidence, with some more of the same sort, was objected to on the ground that it was hearsay. The court overruled the objection and admitted the evidence for the sole purpose of fixing the date. Whether the court meant that it was to fix the date of the homicide, or the date of certain facts about which the witness detailing the hearsay testified, we do not positively know. The record is somewhat uncertain as to which one of these dates the court had in mind. The evidence is admissible for the purpose of fixing one of them, but not for the purpose of fixing the other. A witness may date a fact which he knows by relating it to the time when he heard another fact; and in so doing, may state not only that he heard something, but what that something was, in order to let the jury see what reason he had to observe and remember; but the hearsay, though he repeats it on oath, is not evidence, either of the occurrence or of the date of the fact which it purports to affirm. The fact of a homicide, and the time of a homicide, were indicated by this hearsay, but the witness who repeated it adverted to it not for the purpose (so far as his own mind was concerned) of showing either the fact or the date of the homicide (for these he did not know), but of fixing the time when, as he remembered, his locomotive did not run over anybody, and when he used certain acts of diligence in the starting of that locomotive from the car-shed in Atlanta, and in passing over Pryor street crossing. Now, for the purpose of showing that the witness knew and remembered that on a given date, without knowing the day of the month, or the week, or even the year, he did not run

his engine over anybody, and the bell was rung, and that he ran slowly in starting, this conversation with the other party was admissible; and in order that the jury might see how strong an impression it probably made upon his mind, it was proper to let him detail what his informant had said; but that saying was not any evidence whatever that a homicide had taken place, or, if it did take place, that it was on that day rather than any other day. The evidence for its appropriate purpose was admissible; and the court ruled it in, stating that it was to fix a date. We are bound to presume that it was to fix the date it was competent to fix, and not one that it was incompetent to fix; and therefore we hold that there was no error which appears to us in admitting the evidence.

3. Another ground of the motion for new trial is that in the progress of the examination of this witness, the court, at the instance of counsel for the defendant, interposed, and refused to allow a certain question to be propounded or to be insisted upon after it was propounded. The objection to that question was that it misrecited the evidence of the witness, and endeavored to get him to commit himself to an error embraced in the recital with reference to the month and day of this event. On that we simply rule this: It is the duty of the court both to protect a witness under cross-examination from being unfairly dealt with, and to allow a searching and skillful test of his intelligence, memory, accuracy, and veracity. As a general rule, it is better that cross-examination should be too free than too much restricted. This is a matter that necessarily belongs to and abides in the discretion of the court. In this instance we do not see that the discretion was abused, although we are inclined to think that, if the examination had been allowed to proceed, it would ultimately have done no injustice to the witness, and the court might have interposed in another way; that is, by calling the attention of the witness to this specific date, and giving him an opportunity to explain. There must be allowed some degree of skill, if not sharpness, in conducting cross-examinations; because a witness, however fair and honest and truthful, may not be careful enough, and it is to the interest of justice to expose the blundering of a witness, as well as his willful departures from veracity. A jury ought to be made to know what character of mind they have before them on the witness stand; whether they have a careful, cautious witness, or one who is disposed to take things on trust. That is quite essential. But the court is there watching the proceedings, and acquainted with all the surroundings; it is proper to leave such a question to the discretion of the court; and we so do now. The exact scene will never be repeated, and it is unnecessary to rule upon it more specifically.

4. Evidence that at a former trial of the case the defence relied upon a different theory from the one presented at this

CONDUCT OF
CROSS-EXAMINATION.

trial (it is not stated what sort of evidence) was offered and re-
EVIDENCE OF DEFENCE RELIED UPON AT FORMER TRIAL. jected. We think that the court ruled properly in rejecting it. Just as the plaintiff may vary a line of attack (and did it in this case), so the defendant may vary his line of defence. Taking position in the field, and fighting one in that position, will not prevent a change; indeed in the same trial the defendant may not only urge different defences, but contradictory defences. He may take all the chances in his favor, just as the plaintiff here relied upon one mode of killing at the crossing and another by falling from the cars. It is quite right; and there ought to be no grudging of latitude to bring out the truth, all the truth, and all aspects of it. That at a former trial a different theory of defence was relied on is not relevant as matter of evidence, and the exclusion of testimony to that effect is not error.

5. It is contended that the statute regulating the checking of
STATUTE REGULATING SPEED. the speed of trains at public crossings is applicable to this case. We think not, and hold, on the contrary, that the statute does not require that a train, started at or upon a public crossing, shall be checked and kept checked while passing over that crossing. By natural laws, instead of the situation being one for checking and keeping checked, it is one for unchecking. In passing from rest to motion no checking is possible. The statute contemplates a state in which there can be less motion, and one in which, to make progress at all, there must be more.

6. The charge of the court touching diligence is complained of.
CHARGE OF THE COURT. Whether in a given case due negligence requires that a train should leave on schedule time, or whether persons upon it not as passengers should alight from it before the time of departure fixed by schedule, or whether when a train is starting or about to start a person passing in front of the engine should see to it that the train is not moving or about to move, are all questions of fact for the jury, and not for decision by the court in its general charge. The court undertook to instruct the jury that a train ought to leave on schedule time, and that the conductor ought not to delay its departure beyond schedule time in order to give persons an opportunity to get off. It moreover instructed the jury that ordinary diligence would require that a person passing in front of an engine in the act of starting, or about to start, should see to it that it was not starting or about to start. These were all questions for the jury, under the special circumstances. They are questions of fact rather than of law, because diligence has to be determined in view of the conditions, the special conditions, at the time the conduct under investigation took place, and the standard of decision for ordinary diligence is the conduct of a man of ordinary prudence under like circumstances. That standard is supposed to be in the minds of the jury; and it is the standard in the

minds of the jury with which the conduct involved in the particular case is to be compared. That same standard may be in the mind of the judge, and he may be more competent to make the comparison, yet the law does not permit him to make it. He has no more to do with it than if he had no standard at all. He has no more to do with the determination of a question of diligence in a particular case than if he did not know, and could not find out, what would be the conduct of a man of ordinary prudence in such circumstances. He must simply refer it to the jury. He must tell them what the standard is; that is, give the description of it which the law gives. If it be a case for slight diligence, he must tell them it is that care which every man of common sense exercises; if it be ordinary diligence, he must tell them it is the care which every prudent man exercises; and if it be extraordinary diligence, he must tell them it is that extreme care and caution which very prudent and thoughtful persons exercise. But beyond this he cannot go, unless there is some statute to lead and conduct him. Judgment reversed.

VICKSBURG AND M. R. Co.

v.

PHILLIPS, Admx.

(*Advance Case, Mississippi. May 2, 1887.*)

A boy who had, without objection, got on a train, was ejected from it while in motion, and received injuries from which he died. *Held*, that under Rev. Code Miss. 1880, § 2078, relating to the survival to personal representatives of all deceased's legal and equitable causes of action, and section 2079, specifically prescribing such survival in action for trespass, the right of his administratrix to sue was indisputable.

The death of an injured party cannot destroy the right of action for his injuries: for Rev. Code Miss. 1880, § 1513, permits an action commenced by a deceased person to be revived by his representatives.

The action prescribed by Rev. Code Miss. 1880, § 1510, to be brought by the widow, husband, or child of a person wrongfully killed, for the damage caused by such death to the person suing, is entirely distinct from the action by deceased's representatives prescribed by sections 2078, 2079.

Where a boy was ejected from a train in motion, and received thereby injuries from which he died, it is for the jury to decide whether the railroad company is liable in damages for using improper means to clear its train of boys improperly on it.

Under Rev. Code Miss. 1880, § 1059, which prescribes that proof of injury inflicted by cars or locomotives while in motion shall be *prima facie* evidence of the want of reasonable skill and care on the part of the railroad company's servants, in reference thereto, an instruction that it is for the jury to decide

the question of care or skill in reference to the particular injury is not erroneous.

Rev. Code Miss. 1880, § 1059, is applicable even where the injury sued for resulted from the precedent wrong of the person injured.

Rev. Code Miss. 1880, § 1059, though enacted to meet cases where the manner of the injury inflicted is known only to the railroad servants, is equally applicable where a cloud of witnesses saw the injury.

APPEAL from circuit court, Hinds county.

Jo Brantley, a boy of 11 years of age, lived in Jackson with his aunt, the appellee, and went to school. On his way home from school one day he was attracted to an excursion train on appellant's road by the playing of a band on the train, and went to and entered one of the cars where the band was playing. No objection was made, at the time, to his going into the car. Some other boys were on the car with him. The train moved off to reach a point where a crowd of passengers were waiting to get aboard. While the train was thus moving, a man having a lantern in one hand, and a stick in the other, came through the car, and ordered Jo Brantley and the other boys to get off; hurrying them, and, as some of the witnesses say, striking at them with the stick in his hand. At any rate, in the effort to get off while the train was running, Jo Brantley fell between the cars and was injured so that he afterward died from the effect of such injury. His aunt, Mary Phillips, cared for the injured boy, paid all expenses while he lingered, and also the burial expenses. She then qualified as his administratrix, and brought this action for damages for injuries to the intestate. A trial being had resulted in a verdict and judgment against the railroad company, from which it appealed.

W. L. Nugent for appellant.

Brame & Alexander for appellee.

CAMPBELL, J.—The right of the administratrix to sue, and recover whatever damages her intestate might recover, if living, is indisputable. Code, §§ 2078, 2079. If Jo Brantley had sued, as he might, and died while the action was pending, it would have survived to his administrator by virtue of section 1513 of the Code. Section 2078 authorizes the prosecution, by the personal representative, of any personal action whatever which the decedent might have commenced and prosecuted, and section 2079 specifically authorizes an action for any trespass done to the person or property, real or personal, of the decedent. The last named may have been unnecessary, but it cannot be held to limit the comprehensive language of section 2078. Certainly it authorizes this action, even if it is a limitation of the preceding section. It probably sprung from the determination to secure the survival of this kind of action. It is found as article 46, p. 485, Code 1857, while the original of section 2078, *supra*, is article 119, p. 455, Code 1857.

It is manifest that the death of Jo Brantley did not destroy the right of action; for had he commenced an action, it would have survived by section 1513, as stated above; and section 2079 plainly provides for the institution of such an action by the personal representative. Section 1510 provides for an action to recover for the death of a person, and it is entirely distinct from and independent of an action by the personal representative. They may co-exist, but have no connection.

The instructions asked by the defendant were all properly refused. It was for the jury to decide whether, under the circumstances, the defendant was liable in damages for having used improper means of clearing its train of boys improperly on it, and the court rightly refused to give any of the instructions asked by the defendant.

We find no fault with the instructions for the plaintiff. The first is in accord with section 1059 of the Code. The injury sued for was inflicted by the cars of the defendant when running, and the fact that a precedent wrong produced the conditions which resulted in the injury does not prevent the application of the statute. If Jo Brantley had been on the ground, and been injured by the running train, it would not be denied that the statute applied. Whenever a person or thing is struck and injured by locomotive or cars, the statute applies. That is its language, and we cannot limit it so as not to include all cases embraced by its terms. If proof of injury inflicted by the running of locomotive or cars shows the circumstances, and furnishes exculpation from the presumption of want of care and skill created by the statute, that is sufficient. The statute does not require the company to furnish exculpatory evidence when the facts shown acquit of blame. It means that injury inflicted unexplained calls for exculpation, for it imputes blame in every case of injury inflicted by the running of locomotive or cars until the facts shown relieve from the imputation. When the facts appear, no matter how, it is a question determinable from them whether or not there was want of reasonable skill and care.

The statute was enacted to meet cases where the manner of the injury inflicted is not known to others than the employés of the railroad company, but it is equally applicable where a cloud of witnesses see the injury. It is not needed there, it is true, but it is not error to invoke it, for the law affects the railroad company with liability *prima facie* in every case of injury inflicted by the running of its locomotives or cars. If the evidence showing the injury inflicted rebuts the presumption, well; but, if it does not, the presumption created by law from the fact of the injury in this mode is to stand and control.

It is proper for the court, at the instance of the defendant, to instruct the jury that when the circumstances accompanying the

infliction of injury by the running of locomotive or cars are in evidence before them, it is for them to decide the question of skill and care in reference to the injury from those circumstances. Presumption must yield to facts where they are all known. But it cannot be said to be erroneous to instruct the jury that the law presumes wrong and imputes blame from the fact of injury inflicted by the running of locomotive or cars; for that is precisely what section 1059 does. Affirmed.

CHICAGO AND E. I. R. Co.

v.

HOLLAND.

(*Advance Case, Illinois. September 26, 1887.*)

In an action for injuries caused by the collision of one of defendant's railroad trains with the train which plaintiff was upon, declarations of the conductor of defendant's train, made just before the collision, showing the situation of the train, and that plaintiff's train had not been flagged are admissible as part of the *res gesta*.

Where a witness, on direct examination, stated the contents of a letter to the jury, the original letter may be introduced in evidence on cross-examination.

Defendant, in an action for personal injuries, asked for an order that plaintiff submit to an examination of two physicians named in the motion, which was denied, and afterward defendant sent two physicians to plaintiff's residence, one of whom was allowed to make the examination, and the other was not, but had previously examined plaintiff. Afterward one of the physicians named in the motion also examined plaintiff. *Held*, that plaintiff was not harmed by the denial of the motion.

In an action for personal injuries, an instruction that, if the jury believe the injuries were caused by the negligence of defendant's servants without plaintiff's fault, plaintiff is entitled to recover such damages as the jury may believe from all the evidence he is entitled to receive as compensation for all the damages received and suffered by plaintiff in the premises, is not objectionable, as allowing the jury to give exemplary damages.

In an action for personal injuries, the plaintiff may be allowed expenses of nursing, when there is evidence of his having been nursed and cared for by persons not members of his family, although no estimate has been given of the amount incurred by reason thereof.

The judgment of the appellate court upon the question of excessive damages is conclusive, and will not be disturbed by the supreme court.

On the trial of an action for negligent, personal injuries, during the examination of physicians by appellant regarding certain theories of medical writers, the court, in relation to the practice of making long quotations from medical works, and asking the opinion of the witness thereon, said: "I have a book written in Spanish, by a Mexican lawyer, and I may as well read that

to him as your reading medical works to them." *Held*, that such remark was no injury to appellant of which it can complain.

Where, upon a statement made by appellant's counsel in his opening, a juror remarked that "That won't help you; that will not do you any good," such remark will not authorize a reversal of the judgment.

Where plaintiff offers evidence to prove the amount incurred by him for medical services rendered by several physicians, an objection that "it is incompetent, immaterial, and irrelevant" is too general to raise on appeal the specific objection that there was no proof that any of the alleged physicians were entitled to practice medicine.

Where the jury have been fully instructed upon certain subjects, the refusal of the court to charge further in relation to them, although the requests to charge contain correct propositions of law, is not error.

APPEAL from appellate court, first district; Joseph E. Gary, Judge.

The action was brought to recover damages for injuries sustained from defendant's negligence. Defendant was using the track of the Chicago, Rock Island & Pacific Railway in transferring a freight train from one track to another, and, while the track was thus occupied, a collision occurred between the freight train and a Rock Island passenger train, of which plaintiff was conductor; thus occasioning the injuries complained of. The material facts are stated in the opinion.

Wm. Armstrong for appellant.

G. W. & J. T. Kretzinger for appellee.

CRAIG, J.—On the thirteenth day of October, 1883, appellant appeared in court, and filed a motion in writing asking for an order of court that appellate submit to an examination by two physicians, who are named in the motion. The court EXAMINATION OF INJURIES BY PHYSICIANS. overruled the application, and the decision is assigned for error. Whether this decision was erroneous or not is a question which it will not be necessary here to determine. On the fifteenth day of December, 1884, the appellant sent two physicians of its own selection to the residence of appellee, for the purpose of making an examination of his physical condition. One of the physicians had previously made a thorough examination, and he was not admitted; the other one, however, was admitted, and made an examination. On the twentieth day of December, 1884, appellant sent Dr. H. W. Lyman, who was one of the physicians named in its motion. He was admitted, and made a thorough examination of appellee. In what manner appellant was injured by the decision overruling the motion is not apparent. Had the motion been allowed an examination would have been made by two physicians. The motion was denied, but an examination was in fact made by three physicians of appellant's own selection. Nothing was lost by the decision, as appellant was allowed an examination, which was all it asked by the motion. The fact that the examination was

made at a later period than it would have been made had the court allowed the motion, so far as appears, was a matter of no moment.

It is next insisted that the court erred in the admission in evidence of the conversations of James A. Healy and James C.

DECLARATIONS
OF CONDUCTOR
ADMISSIBLE.

Heckler with the conductor of appellant's train, which occurred a moment before the collision. The evidence of Healy was as follows: "I saw this conductor, and spoke to him, and the words I spoke to him were these: 'Where are you going to?' He says, 'Going over with my train to back into the Pullman Y, over the Rock Island track;' and the words I said to him were, 'You hadn't ought to do any such thing; you will get caught.' I said, 'You are doing it on short time.' I told him we were side-tracked; that we would not undertake to do it; and I asked him if he was flagging, and he said, 'No; he didn't think it was necessary.'" The witnesses testified that the conversation occurred only a moment before the collision. The plaintiff had a right to show the situation of appellant's train, and what precaution, if any, the conductor in charge of the train had taken to guard against danger, and the declarations of the conductor made at the time they were on the eve of the collision were admissible as a part of the *res gestæ*.

A witness was called by plaintiff to prove the amount plaintiff had incurred for medical treatment, and give the amount, both paid and unpaid, aggregating the sum of \$784.80. The plaintiff

COST OF MEDICAL
TREATMENT
MAY BE PROVED.

had been treated by several different physicians, and it is insisted that the evidence was incompetent, as there was no proof that these physicians, or any of them, were entitled to practice medicine, under the statute. When the evidence was offered, the objection made to it was "that it is incompetent, immaterial, and irrelevant." If the law cast the burden upon the plaintiff to prove that the physicians who treated him were entitled to practice, which, however, we do not decide, appellant was bound to make the specific objection on the trial in order that the plaintiff might have an opportunity to remove the objection by proper testimony. The general objection was not enough. It was the duty of appellant to point out the specific objection to the evidence, and a failure to do so will preclude the right to rely upon such specific objection on appeal.

Upon the cross-examination of Dr. Peck, a witness called by appellant, the witness identified a certain letter written by Dr. Durfee in regard to the physical condition of appellee, and the letter was admitted in evidence, and this decision is claimed to be erroneous. The foundation for the introduction of this letter was laid by the appellant in the direct examination of Dr. Peck. The witness stated in his direct examination that the letter was handed to him by appellant, and he then proceeded to give its contents to

the jury. As a part of the cross-examination of the witness, appellee had the right to read as evidence the original letter to the jury. If the contents were proper evidence for the appellant, which he cannot now dispute, the letter itself was likewise competent for appellee.

During the examination of some of the physicians by appellant, obtaining their opinions in regard to some of the theories advanced by medical authors, certain remarks were made by the court in relation to the practice of making long quotations from medical works; and asking the opinion of witnesses thereon, in which the court said: "I have a book written in Spanish, by a Mexican lawyer, and I may as well read that to him as your reading medical books to them." It will be observed that the court made no ruling in regard to the admission or exclusion of evidence, and as to the remark made by the court, we cannot see that it injured any one, and, if appellant was not injured, it cannot complain.

When counsel for appellant was stating the appellant's case to the jury, having made a statement that evidence would be brought out which would prove certain facts, one of the jury-
REMARKS BY JUROR.
 men said, "That won't help you a bit; that will not do you any good." While it was improper for a jurymen to make a remark of that character, and while the court might, with propriety, impose a small fine on a jurymen for a disregard of duty, yet we are not aware of any authority for reversing a judgment where an irregularity of that character has intervened on the trial of a cause.

Some other complaints have been made in the argument in regard to the rulings on the admission of evidence; but, without going over them in detail, it is sufficient to say that none of them is of sufficient magnitude to call upon the court to reverse the judgment.

At the request of the plaintiff, the court gave to the jury three instructions, and they are all claimed to be erroneous. The first one is as follows: "(1) The jury are instructed that, in determining the questions of negligence in this
INSTRUCTIONS TO THE JURY.
 case, they should take into consideration the conduct of both parties at the time of the alleged injury, as disclosed by the evidence; and if the jury believe from the evidence that the injury complained of was caused by the negligence of defendant's servants, as described in the declaration, and if the jury further believe from the evidence in this case that the plaintiff was without fault, and was exercising ordinary care and prudence in the discharge of his duties as conductor of the dummy train, then the plaintiff is entitled to recover in this case such damages as the jury may believe from all the evidence he is entitled to receive, as a compensation for all the damages received and suffered by

said plaintiff in the premises, provided the jury find from the evidence that the plaintiff was injured as described in the declaration." The objection urged against this instruction, as we understand the argument, is that the jury might, under the terms of the instruction, give exemplary damages. The instruction does not inform the jury that they can give exemplary damages. Such damages were not claimed either by the pleadings or evidence, and we cannot conceive how an intelligent jury could, by this instruction, be led off upon that field of investigation. The instruction contains a correct proposition of law, and, if the appellant thought there was any danger that the jury might enter upon the question of exemplary damages, he ought to have requested the court to instruct the jury, in making up their verdict, to disregard all claims or supposed claims on account of exemplary damages.

The second instruction was as follows: "(2) If the jury find the issues for the plaintiff, then the plaintiff is entitled to recover AMOUNT OF DAMAGES. such actual damages as the evidence may show he has sustained as the direct or approximate result of such injury, taking into consideration his loss of time, his pain and suffering, his necessary and reasonable expenses in medical and surgical aid and nursing, so far as the same may appear from the evidence in this case; and, if the jury find from the evidence that the said injury is permanent and incurable, they should also take this into consideration in assessing the plaintiff's damages; and the jury are instructed that the fact that said plaintiff is married, and that his wife is living, cannot be considered by the jury in determining the amount of damages to which the plaintiff is entitled in this case." We perceive no error in this charge to the jury. The damages are confined to the direct result of the injury. The loss of time, and necessary expenses incurred for medical aid and nursing, are matters always proper to be considered in such cases in determining the amount of recovery. It may perhaps be true that no witness estimated the amount in dollars and cents which had been incurred for nursing, but there is abundance of evidence in the record that the plaintiff was nursed and watched over and cared for by day and by night, and by persons, too, not members of the family. Here was ample evidence before the jury from which they might properly consider the nursing, as well as the pain, loss of time, and necessary medical expenses, on arriving at the amount the plaintiff might recover.

The third and only remaining instruction given for the plaintiff merely reiterated the rule of comparative negligence which has been approved by this court in a number of decisions.

The appellant requested the court to give to the jury 42 instructions. The court refused 23 (Nos. 4 to 26, inclusive),

and gave 19 (Nos. 1, 2, 3, and 27 to 42, inclusive). No. 30 was, however, modified, and given as modified. JURY FULLY AND FAIRLY IN-STRUCTED. The decision of the court in modifying and refusing instructions is relied upon as error. There were no difficult or complicated questions of law involved in this case requiring so many instructions. Indeed, such a large volume of instructions ordinarily tend to mislead rather than enlighten a jury, and the practice of giving so many instructions ought not to be encouraged. If, therefore, the jury have been properly instructed in the law involved in the case, the judgment cannot be reversed, although some of the refused instructions may contain correct statements of the law. Instruction No. 30, which the court modified, aside from a technical objection, contained a correct proposition of law, and it might well have been given as asked. The instruction, in substance, declared that plaintiff could not recover unless at the time of the collision he was exercising due care for his personal safety; but the same principle was announced in other instructions, so that the jury had the full benefit of the charge as asked, and nothing more could be required. In the first instruction given for the plaintiff the principle of the modified one is fully given to the jury. It is there, in effect, declared that it is essential to a recovery that the jury find that the injury complained of was caused by the negligence of defendant's servants, and that the plaintiff was without fault, and was exercising ordinary care and prudence in the discharge of his duties. Indeed, the claim was not made that plaintiff could recover unless he was in the exercise of ordinary care at the time of the accident. It is also said that No. 4 should have been given; but the substance of this was given to the jury in No. 42, and no necessity existed for repeating the same thing in different language. The same may be said of other refused instructions; but it will serve no useful purpose to go over them one by one. After a careful examination of all the instructions and the evidence in the case, we are satisfied that the jury, in and by the instructions given, were fully and fairly instructed in regard to all the law involved in the case, and this is all that could be desired or required.

Something is said in the argument in regard to the damages being excessive; but that is a question which does arise here. The judgment of the appellate court is conclusive upon that question.

The judgment of the appellate court will be affirmed.

LAFFLIN, Respt.,
v.
BUFFALO AND SOUTHWESTERN R. Co., Appt.

(*Advance Case, New York. June 7, 1887.*)

As a general rule, when an appliance, or machine, or structure not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe, and convenient, its use may be continued without the imputation of culpable imprudence or carelessness.

A woman, in alighting from a railroad car at a station, in the night time, fell and was injured, and sued the railroad company for negligence in that the station platform was too far from the car. The evidence was that the plaintiff passed from the car to the second step of the car platform, which was two feet and two inches from the side of the station platform and about four inches lower than the top thereof, and without having hold of the iron railing, and without looking to see the station platform, she stepped out, and failing to reach it, fell. The car had a third step which was eight inches below the top of the station platform, and one foot and seven inches from the side thereof. The station platform, as then constructed, had been in use for several years, and no one had ever before been injured or inconvenienced on account of its distance from the cars. *Held*, that the company was not legally responsible for the accident.

APPEAL from a judgment of the supreme court at general term in the fifth department, affirming a judgment of the Niagara circuit on a verdict of \$2000 damages in an action to recover for injuries sustained in alighting from defendant's car. Reversed.

The facts appear from the opinion.

George C. Greene for appellant.

W. S. Oliver for respondent.

EARL, J., delivered the opinion of the court:

This action was brought to recover damages for injuries sustained by the plaintiff in alighting from one of the defendant's cars, and the circumstances of the accident are as follows: The train in which she was a passenger reached the station at Dayton in this State, on the 20th day of January, 1880, at 8 o'clock in the evening, and she left the car for the purpose of changing to another train at that place, and in her effort to step from the car to the station platform, she fell between it and the car, and sustained the injuries of which she complains. She alleges that the space between the platform and the car was too great, and that, in consequence thereof, when she stepped off from the car she failed to reach the platform and was thus caused to fall. There is no

FACTS.

complaint that the platform was out of repair, or that it was improperly constructed. The only complaint is that it was too far from the car. The platform was $2\frac{1}{2}$ feet higher than the top of the iron rail, and about three feet above the top of the ground. The distance between the outer line of the car and the platform was eleven inches. There were three steps at the end of the car, and the lower one was eight inches below the top of the platform and one foot and seven inches from the side thereof. The second step was two feet and two inches from the side of the platform and about four inches lower than the top thereof. The height of the platform of the car above the iron rails was about four feet. The plaintiff passed out of the car on to the car platform and then to the second step, and without having hold of the iron railing on either side, and without looking to see the station platform, she stepped out and, failing to reach it, fell.

There was no proof that the platform was not constructed in the ordinary way, nor that the space between it and the car was any greater than the exigencies of the business and the operations of the railroad required. There was no evidence that any accident had ever happened at that station before on account of the construction of the platform, or that there had ever been any complaint in reference to it. On the contrary, the evidence shows that the platform had been used for many years by men, women, and children, and that no one but the plaintiff had ever been injured or had suffered any inconvenience on account of the distance of the platform from the cars. Thousands of men, women, and children must have passed from the cars to this platform in entire safety.

Under such circumstances, how can it be properly said that the defendant was guilty of any carelessness in its construction and maintenance? It was not bound so to construct this platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient, and useful. It was bound simply to exercise OBLIGATION OF COMPANY. ordinary care, in view of the dangers attending its use, to make it reasonably adequate for the purposes to which it was devoted. In the case of a platform which had always been safe, and answered its purpose for men, women and children, in all kinds of weather, by night and by day, for many years, what was there to suggest to any prudent person any change or improvement for the purpose of making it more safe or convenient?

In the case of *Dongan v. Champlain Transp. Co.* 56 N. Y. 1, the plaintiff's intestate, a passenger, slipped under the gangway rail of a steamboat, fell overboard and was drowned; and it appeared that all the boats upon Lake Champlain were constructed in the same manner, that they had been so run for many years, and there was no proof tending to show that any one had ever be-

fore gone overboard in that way. It was held that the plaintiff was properly non-suited. Grover J., writing the opinion, said :

"It will be seen that the only proof of negligence was the omission to inclose the space between the railing and deck so as to preclude the possibility of slipping under it. Had there been any proof tending to show that any such danger would be apprehended by a reasonable, prudent person, the evidence should have been submitted to the jury. But the evidence showed that all the passenger boats upon the lake had been constructed and run in the same way in this respect; that boats had so been run for a great number of years, and there was no proof tending to show that any one had ever before fallen and gone overboard under the railing, or that any such danger had been apprehended by any one. It is obvious that no such thing was likely to occur."

In *Loftus v. Union Ferry Co.* 84 N. Y. 455, plaintiff's intestate, a child six years old, while leaving one of defendant's boats, fell through one of the openings in the guard rails into the water and was drowned. The plaintiff recovered; and it was held that the verdict was properly set aside. Andrews J., writing the opinion of the court, said: "The law does not impose upon the defendant the duty of so providing for the safety of passengers that they shall encounter no possible danger, and meet with no casualty in the use of appliances provided for it. It was possible for the defendant so to have constructed the guard that such an accident as this could not have happened; and this, so far as appears, could have been done without unreasonable expense or trouble. If the defendant ought to have foreseen that such an accident might happen, or if such an accident could have reasonably been anticipated, the omission to provide against it would be actionable negligence. But the facts rebut any inference of negligence on this ground. The company had the experience of years, certifying to the sufficiency of the guard. That it was possible for a child, even a man, to get through the opening was apparent enough; but that this was likely to occur was negatived by the fact that multitudes of persons had passed over the bridge without the occurrence of such a casualty."

In *Burke v. Witherbee*, 98 N. Y. 562, while an empty car was descending a mine, the hook which fastened it to the cable became detached from the car and it ran down the mine and killed plaintiff's intestate. The judgment for plaintiff was reversed because there was not sufficient proof of actionable negligence on the part of the defendants. The judge, writing the opinion, said :

"In this mine alone cars drawn by a hook must have made several hundred thousand passages without a single accident. What more could any reasonable or prudent man have to justify him in believing that this convenient appliance was also a safe and proper one? What greater or different tests could it have been

subjected to before a mine owner could use it without the imputation of negligence? It seems to us quite inadmissible, if not preposterous, to attribute negligence to a mine owner for using an implement which had been employed in different mines, and which, under varying conditions, upon countless occasions, uniformly answered its purpose without injury to any one."

The application of these authorities to this case is quite obvious. No structure is ever so made that it may not be made safer. But as a general rule when an appliance, or machine, or structure not obviously dangerous has been in daily ^{LONG USAGE—} use for years, and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of culpable imprudence or carelessness. ^{NEGLIGENCE.}

On the evening when this accident happened, the evidence tends to show that it was dark, and that the platform was not plainly visible. It was somewhat lighted by light which came from the car windows, the depot windows, and a lantern in the hands of the conductor; and it does not appear that it was ever lighted in any other way, or that it was usual to light such platforms in any other way. The fact that it was dark made it incumbent upon the plaintiff to take the greater care. She could have kept hold of the iron railing until her foot touched the platform and then she would have been safe. It was not the duty of the defendant to furnish some one to aid her in alighting from the car.

There was some proof that about the time the plaintiff attempted to step from the car upon the platform, there was a slight jerk or jar of the car; but it does not appear that that had anything whatever to do with the accident.

A careful consideration, therefore, of the whole case as it appears in this record, has led us to the conclusion that the defendant is not legally responsible for the accident which befel the plaintiff. It was a misadventure, and no rule of law will permit her to charge the misfortune in whole or in part to the defendant.

The judgment should therefore be reversed and a new trial ordered; costs to abide events. All concur.

Appliances: Railroads not Bound to Provide Against Possibility of Accident.—In *Dougan v. Champlain Transp. Co.*, 56 N. Y., the plaintiff, a passenger on one of defendant's steamers, slipped under the railing of the gangway, fell overboard, and was drowned. The only proof of negligence was the omission to enclose the space between the railing and the deck so as to preclude the possibility of slipping under it. *Held*, that plaintiff could not recover "when numerous boats constructed in the same way had been run for years with perfect safety to the passengers, where there was no ground for supposing that any passenger ever permitted to be there would fall under the railing to find negligence from a failure to board up the space so as to preclude such a possibility could not be justified." See also *Crocheron v. N. S. S. I. Ferry Co.*, 56 N. Y. 656.

In *Loftus v. U. Ferry Co.*, 84 N. Y. 461, the court, in deciding that the de-

fendant had not been guilty of negligence, said: "The company had no reason to apprehend an accident like this, and the arrangements made were such as experience had up to that time shown to be safe and suitable, and sufficient to meet the requirements of its duty."

In *Burke v. Witherbee*, 98 N. Y. 562, as an empty car was descending into a mine the hook to which it was attached became detached, and plaintiff's intestate was struck and killed by the car. *Held*, that the defendant was not guilty of negligence. "It seems to us quite inadmissible, if not preposterous, to attribute negligence to a mine owner for using an implement which had been employed in different mines, and which under varying conditions, upon countless occasions, uniformly answered its purpose without injury to any one." See *Crafter v. Metropolitan R. Co.* L. R., 1 C. P. 300.

STONE

v.

CHICAGO AND WEST MICHIGAN R. Co., Appt.

(*Advance Case, Michigan. May 5, 1887.*)

Where a woman in a delicate state of health received serious personal injuries through the negligence of the servants and employes of defendant railroad company, and was persuaded by the false statements and misrepresentations of her uncle, in whom she confided, and who had been induced or employed by parties on behalf of the company to use his influence over her, and he, taking advantage of her loneliness, poverty, and the sickness of herself and children, used his influence and procured from her a settlement with the company for a pitiful and insignificant sum, and releasing the company from all further liability for her injuries, and the next day she returned the money and due-bill she had received, and renounced the settlement, the court was justified in instructing the jury, in an action for damages brought by her for the injury sustained, to find that the settlement was not the voluntary act of the plaintiff, and was not binding upon her, and was no bar to the action.

Opinions of medical experts based upon testimony not believed by the jury, or upon a state of facts assumed by the expert, are mainly valueless. The theories of such witnesses are not always reasonable, and are never to be regarded when they manifestly conflict with established facts, and the jury is authorized to discard them, and rest upon the actual knowledge of an adverse witness.

ERROR to the Ottawa circuit to review a judgment against defendant in an action for damages for injuries sustained by reason of the negligence of defendant railroad.

The facts are stated in the opinion.

Smith, Nims, Hoyt, and Erwin for defendant, appellant.

George A. Farr for plaintiff, appellee.

MORSE, J.—On the 9th day of January the plaintiff, then pregnant, was a passenger upon defendant's road.

She resided at Bushkill, a station on said road, in the county of Ottawa. She testifies that she was about six months advanced in her pregnancy, and had been that day with other ladies to West Olive to do some trading. When the train reached Bushkill, on her return, she was sitting toward the rear end of the car. The ladies with her, being in the front end, got off before she did. She passed through the car and upon the front platform of the same to alight. She had a market basket with groceries in one hand and a broom in the other. The brakeman reached up and took hold of her hand, and about the time he did so the train started up. She stepped no farther, but the starting of the train, combined with the pulling of the brakeman, jerked her off the car upon the ground upon her knees in the snow. She testified, further, upon cross-examination, that she had stepped down upon the first step before the brakeman took hold of her hand, and that she first struck upon her feet and then fell upon her knees. FACTS.

She felt nothing at the time of falling except a "wrench in her back." She got up and went to the house, and claims it hurt her from that time until the next morning. "Then it kind of died away, and I supposed it was all right; that it would come back no more; and it went on that day and all that night until Wednesday morning; and Mr. Stone was at home then, and he asked me if I was able for him to go away, and I told him yes, I was all right, I felt nothing then; and he went to Johnsville. He had been gone some half an hour, I guess, when my pain returned again, and I was taken with flowing, and at 10 o'clock a miscarriage took place."

It was claimed by the plaintiff that the fall from the car was occasioned by the negligence of the defendant in not stopping its train for a sufficient length of time to allow her to descend in safety, and the sudden starting of the cars while with due care she was attempting to alight therefrom; and that the miscarriage was the result of such fall, and therefore the defendant was liable in damages therefor.

It does not seem to be seriously disputed by the defendant but that the fall, such as it was, was the result of the defendant's negligence, and without the fault of the plaintiff. But it is strenuously contended that the miscarriage could not be the result of the fall, and that the evidence shows beyond cavil that the foetus was dead before the accident.

The company also relied upon the settlement made by its agents with the plaintiff.

The plaintiff brought suit in the circuit court for Ottawa county, and upon the second trial of the cause recovered a judgment in the sum of \$500.

The errors assigned in this court all relate to the charge of the circuit judge to the jury.

The counsel for the defendant requested the court to direct a verdict in favor of the company. This was refused.

They also requested an instruction that "the medical expert testimony shows that the condition of the foetus at the time of delivery, as described by the witness Mrs. Peck—it being delivered in the unbroken sac on Wednesday, and being partly macerated, and having on it discolored spots—was such that death must have ensued prior to the accident of Monday, and that the death of said foetus was not occasioned by said accident."

This instruction was also refused. The defendant further assigns error as follows:

In that the court instructed the jury: "If, however, the jury find from the evidence that the plaintiff had been left alone for several days with three small children, one a baby who had been sick for several days; and that the plaintiff had been obliged to watch for several nights prior to the settlement by reason of the sickness of her babe; and that upon the day of the settlement the plaintiff was suffering from headache, and was so suffering at the time of the alleged settlement; and that the defendant, acting through Harris acting for it, by his statements to her made and effected a settlement, induced her to believe that it would be disgraceful to appear in court in such matters, or that she would be disgraced if she did appear in court, and that she would get nothing in the end; and if, from her condition at the time, she was unable to decide intelligently for herself, or believed such statements, and was induced thereby to make the settlement, and would not have made it without—you have the right to consider these matters; and if the plaintiff did not in fact give her consent to the settlement, from her incapacity to consent, or was induced to consent by the misrepresentations of the defendant's agents, knowingly made and knowingly false on their part, and made to induce the plaintiff to settle, you would be justified in finding that the settlement was not the voluntary act of the plaintiff and not binding upon her."

In that the court instructed the jury as follows: "And if you find from the facts that the settlement was at once repudiated and the money and due-bill returned, it will constitute no bar to this action."

In that the court instructed the jury as follows: "In short, that evidence preponderates in a given case which produced conviction of its truth upon the minds of the jury over and above all evidence opposing that upon the same point. In this case you are to take into consideration the testimony of the plaintiff, the circumstances as detailed by her; you are also to take into consideration the testimony on the part of the defendant, the testimony of the physi-

cians; and if, from the whole testimony in the case, you are satisfied by a preponderance of evidence that this miscarriage was the result of the negligent act of the defendant, and that that was occasioned without any negligence upon the part of the plaintiff in the case, then she would be entitled to recover, so far as this branch of the case is concerned; that is, entitled to recover for that injury."

In support of the two requests of defendant, its counsel contend in this court: (1) there was no evidence from which it could be found that the death of the foetus, and subsequent suffering and miscarriage by the plaintiff, were the result of the accident in question; and (2) that the evidence of the plaintiff shows that she settled with the defendant because she was sick and in straightened circumstances, and wanted the money for the necessities of herself and children, and for no other reason; and that such settlement was voluntary and without fraud upon the part of the defendant, and is binding upon her.

The second request was rightly refused, for the reason that neither the evidence of Mrs. Peck or any other person who saw the child after its delivery disclosed any maceration of the foetus; indeed the contrary was shown by all the testimony.

The errors alleged are really all embraced in the two propositions contended for by the defendant's counsel, and may probably be disposed of in the discussion of said propositions.

There was conflicting evidence as to the appearance of the foetus, and the jury were the sole judges which statement was true.

Mrs. Peck testified that she acted as midwife at the time of plaintiff's miscarriage. She says: "The child looked just as natural as any child could look—a baby that had been miscarried. It was natural in every way, excepting two spots where it showed a little blue on one shoulder and on its hip; otherwise the child was perfectly natural. There was no decaying about it, and if I used the word 'mortified' before (referring to a former trial), I did it without knowing what I meant. I did not intend to use such words, because it was not mortified."

Mrs. Melvin, a witness for the defendant, testified that she was at the house of Mrs. Stone after it was born. The child was in a common-sized cigar-box. She could not tell what day it was, but thought it was the 11th of January, 1883. "It was dry, and there was some black spots upon it, on its shoulders and on its body, and its eyes were sunk in its head."

On cross-examination she said: "I did not take up the child. Those discolored parts were on its back and shoulders. Mrs. Peck handed it to me and showed it to me in the box. I did not take it in the box. She just held it in the box. I did not take it out. She did not take it out of the box. It was lying in the box, face up. It was not dressed. It had nothing on."

The trouble with the expert evidence in this case is that so much of it as was based upon the testimony of Mrs. Melvin was useless unless the jury believed her testimony. And the jury had a perfect right to reject her testimony and accept that of Mrs. Peck.

Upon the testimony of Mrs. Peck, Dr. Smart, one of the experts, simply gave his opinion that he should not think it possible that the death of the child was caused by the accident. And Dr. Johnson, the other expert, testified that, from the evidence of Mrs. Peck, he believed that death must have existed before the accident, and gave as a reason that putrefaction would not set in, in so short a time, because the sac enclosing the child was not broken, and without the access of atmospheric air putrefaction never occurred—the waters must break before it would take place—but that if the child was dead for a long space of time, without the sac being broken, a state of decomposition would come; “the child becomes macerated and discolored, but it is not the black green of mortification; it is a dark and reddish discoloration, which differs from putrefaction. If the air were admitted to that child, it would putrefy and swell, and there would be a green discoloration; but in the waters—with the waters—with the air entirely excluded, you have simply a maceration of the foetus with this discoloration, and that, I take it, is the condition these ladies have described, and that process is very slow. Putrefaction is rapid, but that process of discoloration and maceration is slow.”

Thus Dr. Johnson's opinions were either based upon the testimony of Mrs. Melvin, or upon a state of facts assumed by him, and which came from the testimony of no witness sworn in the case.

The opinions of these two experts were mainly valueless unless Mrs. Melvin was believed. Upon the testimony of Mrs. Peck the jury had Dr. Smart's opinion that the child was not alive at the time of the accident, against the positive testimony of the mother, who testified that she felt its motion upon Monday. Scientific opinions are worthless when pitted against facts. The theories of medical men are not always reasonable, and are never to be regarded when they manifestly conflict with established facts.

To lessen the force of Mrs. Stone's testimony that she felt the motion of the child, the experts testified that women sometimes imagined such things, and that cases had been known where in imagination they passed through the successive stages of pregnancy almost up to the point of delivery, when there had been no pregnancy at all.

But such cases must be exceptional and rarely to be found even in the domain of scientific research, while such occasions are most assuredly wanting from the knowledge and experience of the common lot of mankind. And I think the jury might well be excused

FACTS—SCIENTIFIC OPINIONS.

from taking credence in this story of the imagination, as applied to the statement of Mrs. Stone in this case.

If they believed her, they were authorized to discard the theories of the physicians and rest upon her knowledge of the life within her womb.

In relation to the alleged settlement, I think the question was fairly and properly submitted to the jury. Two years and four months after the accident, and after suit had long been commenced, the station agent of the defendant at Johnsville and one Bishop, a lawyer and a physician, effected a settlement with her and took a receipt from her. Before going to see her they induced or employed her uncle, one Harris, who was living with Bishop, to talk with her and prevail upon her to settle. He told her, so she testified, that it would be a great disgrace for her to be brought up in court; that it was "not nice" for a woman with a lot of children; if she carried the suit on, it could be "put off and put off," and she would get nothing in the end. She believed what he said.

At the time, her husband was away, and she was alone with her little children, one of whom was a baby and sick. She was also sick and had stayed up so much nights with the sick child that she was nervous and excited. She says further: "I was not in my right mind at the time—not what I was before. I was sick six weeks after, on account of being up nights and having sick children to take care of and my baby two months old . . . I was excited and was not capable of hardly knowing what I did do."

A few hours after Harris had persuaded her to settle, Bishop and Bacon appeared on the scene with a receipt for all demands against the company, drawn up for her signature. It was read to her, but she says all she knew as to what it contained was her name and the Chicago & West Michigan R. The total sum to be paid her was \$40. They gave her \$8 in money, and told her that they would send the balance of the money to her, or she could come to Johnsville, eight miles, and get it. Bacon gave her his due-bill for the \$32. The next day she returned the money and the due-bill and renounced the settlement. She testified that she would not have made the settlement had she not believed what Harris told her, that it would be a disgrace for her to go into court. She also testified: "I had had no experience, and that and my being sick, and having no money to buy medicines for my children was what influenced me to sign that paper; if I had not been sick myself, and had had time for an afterthought, I would not have done so. The statement of Mr. Harris made me believe it would be a disgrace to come into court. I did not want to come. I supposed he would influence me rightly, and that influenced me. He said if I carried the suit on in court, it would be put off and put off, and I would get nothing in the end."

Q. Did you suppose, at the time, that he told you the truth about it being a disgrace to appear?

A. Yes, sir. I knew nothing about courts or law whatever, and I supposed he did.

She also testified, in response to a question how long another child had been sick: "Oh, only just a short time; but there was no money in the house to get any medicine with, and I had no way of getting any, and my thoughts were, if I could get this money I could get medicines for my children. The children being sick was the most that I thought of. I thought of nothing else except to help them."

Harris, Bacon, and Bishop did not contradict her, and were not offered as witnesses.

The misrepresentations of Harris were the misrepresentations of the defendant. If the company insists upon the settlement it must recognize his agency. Advantage was taken of the loneliness, poverty, and sickness of the plaintiff to make a settlement with her for a pitiful and insignificant sum. Her ignorance was also played upon by one in whom she relied, and whom she trusted. He was employed because of his relationship and influence over her. There can be no doubt but the woman was imposed upon and wronged, and the courts should not hesitate in such cases to speak plainly and give relief.

The defendant cannot complain of the action of the court below. The jury were instructed in its behalf: "If she was induced to make the settlement by reason of wanting money to buy medicines for her children, and made it understandingly, and without fraud or undue influence upon the part of those acting for the defendant inducing such settlement, then the settlement is binding upon her and a bar to this action."

There was therefore no error in submitting the facts in this case to the jury. Their verdict upon the merits was against the defendant, and the judgment entered thereon in the court below must be affirmed, with costs.

The other justices concurred.

Release Procured by Fraud.—In *Dixon v. B., C. & N. R.*, 100 N. Y. 170; the defendant set up a release executed by plaintiff soon after the injury. There was testimony showing that at the time of its execution the plaintiff was in a condition of mind that rendered him incompetent to appreciate the character of the instrument which he executed. *Held*, that it was for the jury to determine whether it was his free act, done with full knowledge at the time of the facts, and with a full appreciation of what he was doing. See also *Bussian v. M., L. S. & W. R.*, 10 Am. & Eng. R. R. Cas. 716. As to release of damages for personal injuries obtained by fraud, see *Chicago, etc., R. v. Lewis*, 19 Am. & Eng. R. R. Cas. 224-233, note; *Hayes v. B., C. R. & N. R.*, 19 Am. & Eng. R. R. Cas. 220; see also *Hirschfeld v. L. B. & S. C. R., L. R.*, 2 Q. B. D. 1.

But the evidence of fraud in such cases must be clear, precise and indubi-

table, otherwise the case should be withdrawn from the jury. A mere scintilla of evidence is not sufficient to take a case to a jury. *P. R. v. Shay* 82 Pa. St. 198.

PENNSYLVANIA R. Co., Plaintiff in Error,

v.

PETERS.

(*Advance Case, Pennsylvania. May 2, 1887.*)

In an action for negligence, whenever the standard of duty shifts not according to any fixed rule but with the facts and circumstances developed at the trial, the question of negligence cannot be determined by the court but must be submitted to the jury.

Where a passenger leaving a railway train at his destination crowds through out-bound passengers who have been admitted to the platform and door of the car and, finding upon reaching the steps that the train has started, jumps off the steps, is injured, and sues the railroad company for damages, it is for the jury to say whether the railroad company was guilty of negligence in admitting the passengers or starting the train, and whether the plaintiff was guilty of contributory negligence in jumping from the steps.

A mere mistake on the part of a trial judge in misnaming in his charge to the jury a witness to whose testimony he refers, is not ground for reversal, if the jury could not have been misled by it.

JANUARY term, 1886, No. 54, E. D., before Mercur, Ch. J., Gordon, Trunkey, Sterrett, Green, and Clark, J. J.

Error to the common pleas of Centre county, to review a judgment on a verdict for the plaintiff in an action of trespass on the case.

The facts are stated in the opinion.

The defendant submitted, *inter alia*, the following points:

1. Admitting the evidence of plaintiff to be true, it shows that he contributed to the injury complained of, and without his negligence it would not have happened.

Ans. "This point is denied." First assignment of error.

3. If the plaintiff voluntarily, and without any direction from any one representing the company, stepped off the train when in motion, he cannot recover.

Ans. "This point is denied." Second assignment of error.

4. If the jury believe that the plaintiff stepped off the cars while in motion, it is negligence *per se*, and he cannot recover.

Ans. "This point is denied. That is not the law in this State." Third assignment of error.

5. That the undisputed evidence in the case shows that the

plaintiff was injured by his own act and misconduct, and he cannot recover.

Ans. "This point is denied. We have submitted to you that question and you remember our instructions." Fourth assignment of error.

6. If the jury believe from the evidence that the plaintiff stepped off the car while it was in motion, and by reason of which he sustained the injury complained of, he was guilty of want of due care which would prevent him from maintaining his action.

Ans. "This point is denied. We have instructed you on the law embraced in the point; and you will apply the law to the evidence as we have instructed you." Fifth assignment of error.

DEAN, P. J., instructed the jury, *inter alia*, as follows:

If the admitted or undisputed facts were all the facts in the case bearing on this issue, we would without hesitation instruct you that under the law the plaintiff could not recover, because his own negligence contributed to the accident. Ordinarily, it is negligence to get on or off a moving train, and one who does so and is injured cannot recover from the railroad corporation, no matter what may have been the negligence of the corporation. It is notorious that it is dangerous to get on or off a moving train; a man who voluntarily risks this danger and sustains injuries is negligent; he does not show ordinary care; he shows absence of ordinary care, if he performs the act voluntarily. The defendant alleges that the plaintiff's act being voluntary, the rule of law is applicable in this case.

[It is true this is the general rule, but there are exceptions to it. Whether this case comes under the general rule or is an exception depends upon whether there are other facts or circumstances in the case which rebut the presumption of negligence generally warranted by the mere fact of getting off a moving train. Whether there be such facts in this case, we are clear, is a question for you and not for us.]

If the train did not stop such reasonable time as was sufficient to enable Mr. Peters, moving with reasonable promptness, to get off while it was still standing, then was he guilty of negligence in getting off while it was moving. [This is the next question: in order to recover at all on the part of the plaintiff, he must establish negligence on the part of defendant to the satisfaction of the jury; but yet, after he has once done this, does the evidence show contributory negligence on his part, the burden then is on the defendant to show such contributory negligence where such negligence is set up as a defence.] . . .

It is dangerous to jump or step from a moving train. This is a fact known to all persons of ordinary intelligence. [If a man does

voluntarily that which is generally accompanied by risk of life or limb, does that which a person of ordinary prudence would not do, therefore he is presumed to be negligent. But this is a presumption to be drawn by you. It is a presumption which may not be warranted in view of all the other facts surrounding the act. Circumstances attending may show that this presumption is not warranted in the particular case.] A man may jump off the cars as a matter of safety; because of the position he occupies in the car it might be extremely hazardous to remain—for example, if a collision were imminent; or he may step off, at the invitation or command of the conductor. It would depend upon the particular circumstances of the case as to whether this presumption is warranted.

We have no hesitation in saying to you that if the plaintiff was in the car in a place of safety when the car commenced to move and he knew that it had started while he was in the body of the car, ordinary prudence and care demands that he resume his seat and await the next stopping place. It would be negligence, if not recklessness, to go from the inside of a car and get off when he knew it had started from the station. It was negligence, if not recklessness, to go out on the platform and jump from a moving train or step from a moving train if he started from his seat knowing that the train had started; nothing could have prompted him to this except the inconvenience of being carried to the next station and being subjected to the trouble of going back.

[But if the car was not moving, or if moving, moved so slowly that he did not observe it until he got on the steps, then it is a question for you whether, under the circumstances, it was negligence in him to get off. What a man of ordinary prudence would have done under the same circumstances would be the question.]

If he first noticed that the train was moving when at the point he said he noticed it, on the second or lower step—not what a prudent man not in his situation might think ought to have done, but what ought to have been done under the circumstances, would be the question. We all know that here, after coolly and dispassionately examining and weighing the evidence, and after hearing the narratives of the witnesses, it would probably have been more prudent if he had gone back into the car.

[But what would a prudent man have done standing on the car steps, and just at that moment observing for the first time that the car was slowly moving? Standing on the car steps and observing for the first time the car slowly moving, taking him away from his destination, with the difficulty and danger, if any there were, of a man of his age and habit getting safely up the steps into the car, what ought to have been done with these surroundings in the exercise of ordinary prudence? You are to judge of that.]

If in the exercise of ordinary prudence he ought to have refrained from stepping off, then he was guilty of contributory negligence and cannot recover. If he ought to have gone back into that car, in view of all the evidence that has been submitted to you, he was negligent in not going back, and cannot recover.

[If, however, situated as he was, he did that which a prudent man, under the same circumstances, in the same situation, would have done, then no negligence can be imputed to him, and he can recover, if you find the company was guilty of negligence in not stopping the train a reasonable time and his injury resulted therefrom.] You will consider all the evidence bearing on this question as to whether he was guilty of contributory negligence.

The portions of the charge inclosed in brackets were the subject of the sixth, seventh, eighth, ninth, tenth, and eleventh assignments of error. The twelfth assignment of error specified the following portion of the charge: "One of the men who got on, Bennett, was going up as Peters came down, yet Bennett got on just before the car started."

Verdict and judgment were for the plaintiff for \$3,000.

Edmund Blanchard, Evan Blanchard, and Adam Hoy for plaintiff in error.

John H. Orvis and D. S. Keller for defendant in error.

STERRETT, J., delivered the opinion of the court: Neither of the twelve specifications of error raises any question as to the sufficiency of the evidence to sustain the averment of negligence on which the action is grounded; nor does either of them involve any question as to the admission or rejection of evidence. They all, except the twelfth, relate exclusively to the subject of contributory negligence; and as to that, the only inquiry suggested is whether it was a question of law for the court or one of fact for the jury. The learned judge of the common pleas, holding that it was the latter, refused binding instructions and submitted the question to the jury, as one of fact, under all the evidence. In so doing he rightly adhered to the well-established rule that whenever

STANDARD OF DUTY. of the standard of duty shifts, not according to any fixed rule, but with the facts and circumstances developed at the trial, the question of negligence cannot be determined by the court, but must be submitted to the jury. *Schum v. Pa. R. Co.*, 107 Pa. 8, 12; *Pa. R. Co. v. Coon*, 2 Cent. Rep. 323, 111 Pa. 430, 440.

Negligence is the absence of care according to the circumstances, and is always a question for the jury, when there is a reasonable doubt as to the facts or as to the inferences to be drawn from them. When the measure of duty is ordinary and reasonable care, and the degree of care varies according to circumstances, the question

of negligence is necessarily for the jury. *Pa. R. Co. v. White*, 88 Pa. 327, 333.

It is impossible to formulate a fixed rule of duty applicable to all cases. A case of conduct which, under certain circumstances, may be justly regarded as the exercise of ordinary care, would, under other circumstances, be gross negligence. The opportunity for deliberation and action, the degree of danger, and many other considerations of like nature, affect the standard of care that may be reasonably required in a particular case.

While this is the general rule there are, of course, exceptional cases, in which the measure of duty is determinate, the same under all circumstances; as, for example, the inflexible rule of duty which requires persons, about to cross a railroad track, to stop, look, and listen; but the case at bar is not within any of the recognized exceptions to the general rule; and hence, there was no error in submitting the question of contributory negligence to the jury.

The evidence tended to prove substantially the following state of facts: the plaintiff, a large and corpulent man about seventy years of age, took passage on the train for Port Matilda Station. The cars were well filled with passengers, but he found a seat at the forward end of the passenger compartment of the smoking car, about thirty-five feet from the door through which it was necessary for him to make his exit. As soon as the train [FACTS.] stopped at Port Matilda, he arose and made his way through the cars as speedily as possible, but when he reached the door he was delayed by a group of passengers who had boarded the train as soon as it stopped and before those desiring to leave had either time or opportunity to do so. He was obliged to push his way, as best he could, past those who obstructed the doorway and platform. When he reached the last, or next to the last step, leading down from the platform, he discovered that the train had commenced to move. The impetus acquired in leaving the car rendered it difficult, if not impossible for him then to retrace his steps.

Testifying as to his situation, when he first discovered the train was in motion, he says: "Then I could not take myself back again." In the language of one of the witnesses, "He seemed when he got to the last step as though he was going to stop; he stepped as though he was afraid to go, but by that time he had got too far and stepped right off the end." The result was that he was thrown upon the ground and sustained the serious injuries complained of. The train was held at the station an unusually short time, about twenty-five or thirty seconds. Those who wished to enter were permitted to do so before reasonable time or opportunity was allowed for passengers to safely leave the car.

The evidence was such as to justify the jury in finding these and other facts, warranting the conclusion of negligence on the part of the company defendant's employees, and negating the allegation

of contributory negligence. In other words, the subjects of inquiry fairly presented by the evidence were defendant's negligence on the one hand, and contributory negligence of the plaintiff on the other. Both of these were questions of fact exclusively for the QUESTIONS FOR JURY. consideration of the jury; and as such they were submitted in a clear and satisfactory charge. The controlling facts, as settled by the verdict, are that the injuries sustained by plaintiff resulted from the negligence of defendant's employees in starting the train before he had sufficient time and opportunity to alight in safety, and not from his own carelessness in leaving the car while it was in motion. For injuries thus sustained by a passenger, the carrier company is undoubtedly liable. *Pa. R. Co. v. Kilgore*, 32 Pa. 292.

It is unnecessary to notice each assignment of error specially. The last specification is without merit. The jury could not have been misled by the mistake of the court in misnaming the witness to whose testimony reference was made. The remaining specifications all relate to the subject of contributory negligence, which as we have seen was properly submitted to the jury as a question of fact, under all the evidence. There is nothing in any of the specifications of error that would warrant a reversal of the judgment.

Judgment affirmed.

Alighting from Moving Trains.—Whether or not a passenger is guilty of contributory negligence in alighting from a moving train depends upon the circumstances of the case, and is a question of fact to be determined by the jury. For full discussion, see *Hemmingway v. C., etc., R.*, 28 Am. & Eng. R. R. Cas. 220; *Strand v. C. & W. M. R.*, 28 Am. & Eng. R. R. Cas. 213, 216, note; *L. S. & M. S. v. Bangs*, 3 Am. & Eng. R. R. Cas. 431, note; *Cin., etc., R. v. Peters*, 6 Am. & Eng. R. R. Cas. 136, note; *Edgar v. N. R. R.*, 22 Am. & Eng. R. R. Cas. 437, note; *Nance v. R. Co.*, 26 Am. & Eng. R. R. Cas. 227, note; *Shannon v. B. & A. R.*, 23 Am. & Eng. R. R. Cas. 511, 514, note; 21 Am. & Eng. R. R. Cas. 364, note; 23 Am. & Eng. R. R. Cas. 437, note; *Adams v. L. & N. R.*, 21 Am. & Eng. R. R. Cas. 380; 27 Am. & Eng. R. R. Cas. 156, note; 26 Am. & Eng. R. R. Cas. 216, 218; *Id.* 227, 228; *L. R., etc., v. Atkins*, 40 Ark. 423; *Van Ostran v. N. Y. C.*, 35 Hun (N. Y.), 590.

Alighting from a moving freight train has been held to be negligence. *H. & St. T. R. v. Clotworthy*, 21 Am. & Eng. R. R. Cas. 371.

Plaintiff purchased ticket to ride on freight train. No one instructed him to get upon train or what car to get into. The train arrived at the station and stopped a sufficient length of time for the plaintiff to walk to caboose and get upon it, which he failed to do. Conductor gave signal for train to start. As train approached platform, moving slowly, plaintiff without waiting for caboose car attempted to get upon stock car, fell, and was injured. *Held*, railroad company not guilty of negligence. *Warren v. S. Kan. Ry. (Kan.)*, 15 P. Rep. 601.

So where plaintiff was injured in attempting to board a moving train on an elevated railroad it was held that he was guilty of contributory negligence. *Solomon v. Manhattan R. (N. Y.)*, 9 N. E. Rep. 430; *Card v. Manhattan R.*, *Id.* 433.

Where a passenger incumbered with hand baggage alighted from a train moving six miles an hour on a dark night, before it had reached the platform

of the station where he was to get off, and had no reason to believe that the train would not stop as usual, it was held that he was guilty of contributory negligence. *S. & W. A. R. v. Schaufler*, 75 Ala. 136.

In *E. Tenn., etc., R. v. Massengill*, 15 Lea (Tenn.) 328, it was held that a passenger who alights while the train is in motion is guilty of contributory negligence. But compare *E. Tenn., etc., R. v. Conner*, 15 Lea (Tenn.), 254.

One who without an invitation attempts, at a station not a regular station, to board a train moving at the rate of five or six miles an hour, and falls between the platform and the cars, is guilty of negligence. *D. S. P. etc., v. Pickard*, 8 Col. 163.

Where it was claimed that plaintiff heedlessly jumped from train while in motion, an instruction that he could not recover if his negligence contributed to accident, was held not to be erroneous for omitting the word "proximately." *Craven v. Cent. P. R. (Cal.)*, 13 P. Rep. 878.

In an action to recover for injuries received in alighting from a train where it was in dispute whether plaintiff carelessly jumped from the train while it was in motion, *held*, that defendant might show that during the year preceding the accident plaintiff had frequently travelled over the same route, had frequently jumped off the cars while in motion, and had been warned of the danger of doing so. *Craven v. Cent. P. R. (Cal.)*, 13 P. Rep. 878.

Alighting from Moving Train by Order of Conductor.—Where passenger alights from train in obedience to instructions of conductor he cannot be held guilty of contributory negligence, unless he exposed himself to an obvious risk which a prudent man would not incur. *C., H. & I. R. v. Casper (Ind.)*, 13 N. E. Rep. 122; *Raven v. C. I. R. (Iowa)*, 34 N. W. Rep. 621.

If railroad fail to stop a reasonable time at station, and plaintiff, obeying conductor's instructions, attempts to get off while train is going slowly and the danger was not apparent, and plaintiff took no more risk than prudent man would have taken under the circumstances, his conduct is not negligent. *St. L., I. M. & S. v. Person (Ark.)*, 4 S. W. 755.

A railroad company is liable for injuries received by a passenger who, in accordance with orders of conductor, jumps from a moving train, the speed of which has merely been reduced at the station where he wishes to alight. *Bucher v. N. Y. C.*, 98 N. Y. 128.

In action for injuries caused by starting train while plaintiff was attempting to get on, burden of proving contributory negligence on defendant, when shown that she had gone close to train to be ready to board it, and when notified by a brakeman to get on and that she would have plenty of time, attempted to do so. *Tex. P. R. v. Davidson (Tex.)*, 4 S. W. Rep. 636.

In action against railroad company caused to plaintiff by train starting while she was attempting to get on, an instruction to jury that if plaintiff's averments are true, including averment that she had been promised ten minutes by conductor to check her baggage, and train started before that time expired, then they should find for plaintiff, not erroneous as laying too much stress on time promised by conductor. *Tex. P. R. v. Davidson (Tex.)*, 4 S. W. Rep. 636.

In an action for negligently killing a passenger while attempting to alight from a moving train, the brakeman's remark, "Come on, hurry up!" is admissible as part of the *res gestae* and tending to rebut contributory negligence. *Waller v. H. & St. J.*, 83 Mo. 608.

One who, while being ejected from a train, jumps before the train stops, because he is ordered to, is not guilty of contributory negligence. *Int. & G. N. R. v. Hassell*, 62 Tex. 256.

But where the danger of alighting is obvious, and such as a reasonable man in the exercise of care would not incur, the plaintiff cannot recover unless he was compelled by the conductor or brakeman to alight.

A complaint for injuries charging that plaintiff was "compelled and

forced " to alight from defendant's car while in motion, and that the injuries were received by reason of defendant's agent's negligence, in so " forcing and compelling," *held*, not sustained by evidence that the conductor approached plaintiff in the car and said, " We have got no time; hurry up!" and repeated that several times while plaintiff was getting out. *S. & N. A. R. v. Schaufler*, 75 Ala. 136.

The words " Jump off quick, if you are going to," used by a conductor to a passenger who had resolved to get off a train after it had pulled out of a station is not such an authoritative command as would justify the bringing of an action against the railroad company for injuries received by the passenger in jumping off the train while in motion. *Vimont v. C. & N. W. R. (Ia.)*, 32 N. W. Rep. 100.

Passenger boarded a freight train to go to a station at which the train did not stop. Conductor was angry and abusive, and ordered the passenger to jump off when the train reached the station. He made no threats to put him off. Passenger jumped while train was going ten or twelve miles an hour and was injured. *Held*, could not recover. *St. L., I. M. etc., v. Rosenberry*, 45 Ark. 256.

See the authorities on this subject collected in 21 Am. & Eng. R. R. Cas. 409, note; *Vimont v. C. & N. W. R.*, 28 Am. & Eng. R. R. Cas. 210.

As to starting train while passenger is alighting, see 27 Am. & Eng. R. R. Cas. 179.

Where a station had been announced, the train stopped at the accustomed place and a passenger, who was descending the steps in the act of alighting, was thrown down, either by the sudden jerking of the car or its unexpected forward motion, *held*, that plaintiff, being on platform in response to defendant's invitation to alight, was guilty of no negligence, and that defendant was guilty of negligence for which an action would lie. *N. & W. R. v. Prinnell (Va.)*, 2 S. E. Rep. 95.

A train nearly stopped at a station and started on again suddenly, unexpectedly, without warning, and with a jerk, just as a passenger was in the act of alighting. *Held*, that he was not guilty of contributory negligence. *Nance v. C. C. R.*, 94 N. C. 619.

A passenger who was asleep in the caboose when his station was reached, being told by the conductor, shortly after passing it, that if he wanted to get off to get off quickly, took his stand on the steps ready to get off if the train stopped, and while standing there was thrown off by a sudden jerk in taking up the " slack" of the train. *Held*, that he was guilty of contributory negligence. *Lindsey v. Ch., R. I., etc., R.*, 64 Iowa, 407.

If a railway company stops a train long enough for a passenger to alight it is not necessarily liable for an injury occasioned by starting the train while he is attempting to alight. *Clotworthy v. H. & St. J. R.*, 80 Mo. 220.

WHITE

v.

BOSTON AND ALBANY R. Co.

(Advance Case, Massachusetts. May 7, 1887.)

The plaintiff, a passenger on defendant's road, was injured by the falling of a porcelain lamp-shade fixed in the upper part of the car. In an action to recover damages for the injuries received. *Held*, that the fact that the shade fell was alone sufficient to authorize the jury to find that it was in an unsafe condition owing to defendant's negligence.

ACTION of tort for personal injuries, received by the plaintiff, by the fall of a portion of one of the porcelain shades of a lamp fixed in the upper part of the car of the defendant, in which the plaintiff was a passenger. The whole of the evidence at the trial in the superior court touching the question of the defendant's negligence was as follows :

The plaintiff was a passenger on the train, and was a minor, about four years of age. The lady who accompanied and had charge of her testified that they took the train leaving Boston at 3.45 p.m., on April 9, 1885, to go to Faneuil. The lamps in the cars were not lighted. Before reaching Columbus avenue station, which is the first station out of, and two or three minutes' ride in the cars from Boston, she heard a crash over her head, and an instant afterward several pieces of the porcelain shade fell from the upper part of the car into her lap; one struck the plaintiff on the face, and inflicted the injuries complained of. A Miss Barker testified that she saw a piece of the shade falling, and saw it strike the child. It came from the porcelain shade of a lamp directly overhead, and in the top of the car, which was a fixture in the car. A Mrs. Huk testified that she saw pieces of the shade on the floor of the car, and saw the conductor take down the remaining portion of the porcelain shade, which he did by standing with his feet on the two opposite seats and reaching up to the lamp-fixture in the top of the car. It appeared that just after the accident the conductor took the names of several witnesses to the accident. The defendant rested its case upon the plaintiff's evidence.

Upon this evidence the defendant requested the court to rule that the plaintiff could not recover, but the court refused so to rule, and ruled that, upon that evidence, the question of the defendant's negligence was a question of fact for the jury, to which ruling and refusal to rule the defendant excepted.

W. Gaston and C. L. B. Whitney for plaintiff.

S. Hoar for defendant.

W. ALLEN, J.—If the shade was defective and unsafe, the question whether it was in that condition through the negligence of the defendant would be for the jury, and the fact that it broke and fell from the use for which it was intended would be evidence that it was defective and unsafe, and if not explained or controlled, would be sufficient evidence to authorize the jury to find that the defendant was negligent in regard to it. The fact that the act of the defendant in placing and using the fixture in the car caused the injury would be evidence that it was caused by the negligence of the defendant. The contention of the defendant is that there was not sufficient evidence of that fact; that it did not appear that the accident was not caused by the act of a stranger, or by some external force for which the defendant was not responsible. We think that the question was for the jury, and that they were authorized to infer from the situation of the fixture, from the absence of evidence of any other cause of the accident, and the probability that there would have been such evidence had such cause existed, and from all the attending circumstances in evidence, that the accident must have been caused by the insufficiency of the fixture. It was not necessary that the evidence should show that it was impossible that there should be any other cause; it was sufficient if it satisfied the jury that there was none. *Ware v. Gray*, 11 Pick. 106; *Field v. Middlesex R. Co.*, 109 Mass. 398; *Kendall v. Boston*, 118 Id. 234; *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312.

Exceptions overruled.

CITIZENS' ST. RY. Co.

v.

TWINAME.

(*Advance Case, Indiana. September 27, 1887.*)

Action against a street-railway company for negligence resulting in an injury to the plaintiff, a passenger, caused by the car running off the track where it was being repaired. The court instructed the jury that "a street-car company is a common carrier, and, while not an insurer of the safety of its passengers, it is bound to exercise the highest degree of skill and foresight for the safe carriage of passengers upon its cars; and this care and foresight must extend, not only to the running of its cars, but also to the construction and repairs of its track; and, for injuries caused to a passenger by reason of failure to exercise such skill and foresight, it is liable to such passenger, provided such passenger was not guilty of any negligence directly and materially contributing to produce such injuries." *Held*, correct.

An instruction, in substance, that it does not necessarily follow that a passenger is negligent in getting on a car, even if he knew that the track was unsafe—for example, if the car upon which plaintiff was riding was standing on the track, and she and others were permitted to get on and deposit fares, this may be sufficient evidence, in the absence of evidence to the contrary, of an invitation by the company to take passage, and if she did so she cannot be deemed negligent in so doing merely from the fact, if such is the fact, that she knew the track was being repaired, and in a dangerous condition; for she had a right to presume that the defendant had used or would use due care, that is, such as persons of the highest degree of skill and foresight would probably have used under the circumstances, to avoid the danger incident to the condition of the track; but if she knew of the dangerous place, and was warned by defendant's employees not to get into the car until it was passed, but persisted, in spite thereof, in getting in and taking the risk, and after so doing received the injury complained of, then she must be deemed guilty of contributory negligence, and cannot recover. *Held*, correct.

When, in an action against a street-railway company for damages for an injury to a passenger, an agreement by the plaintiff to take the risk is relied upon as a defence, it must be specially pleaded.

APPEAL from superior court, Marion county.

H. C. Allen for appellant.

Harrison, Miller & Elam for appellee.

NIBLACK, J.—This was an action by Louisa B. Twiname against the Citizens' Street R. Co. to recover damages for injuries alleged to have been sustained by her while riding on one of the company's cars on the seventh day of May, 1883. The answer was in general denial. There was evidence tending to show that, at the time the injuries complained of were received, the plaintiff resided on Massachusetts avenue, in the north-eastern part of the city of Indianapolis; that on the morning of the day named she came down on an errand to a wholesale business house on South Meridian street, near the Union Depot; that, after completing her business with the wholesale house, she went across to a point nearly opposite, on Illinois street, where she found a Massachusetts avenue street car, belonging to the street railway company, standing on the track, headed in a northerly direction, which was FACTS. the direction in which she wanted to go on her return to Massachusetts avenue; that she entered the car in question with other passengers, and, after depositing her car-fare in the box provided for that purpose, took her seat; that the car soon started northward along Illinois street, where in a short time it came to a place at which employees of the company were digging under and repairing the track; that at that point the car was run off or precipitated from the track, by means of which the plaintiff was thrown heavily against one of the seats, and then to the bottom of the car; that sick and faint she was assisted out of the car; that she was then about to seek other means of conveyance home; that

one of the company's employees thereupon insisted that she had better wait until the car should be replaced upon the track, as it would be in a short time, when she could continue on her journey in the same car; that she did so wait for a short time, and until the car was replaced upon the track, when she re-entered it and took a seat; that, after proceeding a short distance, the car again ran off the track, as a result of which she was again thrown heavily down; that on reaching home the plaintiff was in much pain, and ascertained to be severely bruised. There was also evidence tending to show that the plaintiff either must have known or could easily have seen that the track was torn up and being repaired at the places at which the car ran off. There was likewise some evidence to prove that, when the plaintiff was about to re-enter the car after it first ran off the track, one of the company's employees warned her not to do so until after it had passed the place at which it went off the second time, and that she refused to heed the warning, but as to that the evidence was seriously conflicting.

The court, trying the cause at special term, on its own motion gave the jury a series of instructions, the fourth and eighth of which were as follows: "(4) A street-car company is a common carrier, and, while it is not an insurer of the safety of its passengers, it is

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bound to exercise the highest degree of skill and foresight for the safe carriage of such passengers upon its cars, but also to the construction and repairs of its track. And for injuries caused to a passenger, by reason of failure to exercise such skill and foresight, it is liable to such passenger, provided, such passenger was not guilty of any negligence directly and materially contributing to produce such injuries." "(8) Again, it does not necessarily follow that a passenger is guilty of negligence in getting upon a car, even if it be proved that such passenger knew that the track was unsafe. For example, if the car upon which the plaintiff was riding at the time of the accident in controversy was standing upon the track, and she and others were permitted to get on and deposit their fares, this may be considered as sufficient evidence, in the absence of evidence to the contrary, of an invitation by the company to her to take passage; and, if she availed herself of such invitation, she cannot be deemed guilty of negligence in so doing merely from the further fact, if such is the fact, that she knew the track was being replaced or repaired, and was in a dangerous condition; for she had a right to presume, in the absence of knowledge to the contrary, that the defendant had used or would use due care to avoid the danger to passengers incident to the dangerous condition of the track; that is, such care as a person of the highest degree of skill and foresight, with knowledge of all the existing facts and circumstances, would probably have used, in view of such dangers, to guard against accidents to passengers by reason thereof. But if the plaintiff knew that

there was a dangerous place in the track, and was warned by the employés of the defendant not to get in the car until after it had gotten over such place, but she persisted, CONTRIBUTORY NEGLIGENCE. in spite of such warning, in getting in and taking the risk, and after so getting in she received the injuries of which she complains, then she must be deemed guilty of contributory negligence, and cannot recover."

A verdict and judgment for the plaintiff followed, and the judgment thus obtained was affirmed at the general term. Questions were reserved, and have been elaborately presented upon the instructions set out as above.

A railway company is a common carrier of passengers as well as of freight. A street-railway company is also a common carrier of passengers, with duties and responsibilities entirely analogous to and substantially the same as those of a railroad company in the carriage of passengers. Both are railway companies within the usual meaning of that term, and the same general rules and degree of care in the transportation of passengers must be observed by each. *Thomp. Carr.* 26, 442; *Railroad Co. v. Taffe*, 37 Ind. 361; *Hutch. Carr.* §§ 500-504. Carriers of passengers are required to exercise the utmost skill and foresight in the performance of their duty as such carriers. See 1 *Lac. R. R. Dig.* 412, par. 99, and authorities cited. Also *Railroad Co. v. Buck*, 96 Ind. 346, and *Railroad Co. v. Rainbolt*, 99 Ind. 551. This is the equivalent of requiring that the highest degree of care and skill shall be used in the transportation of passengers, as the rule is stated by many of the decided cases. See, also, *Lac. R. R. Dig.* and the cases there cited. Railway companies are bound to provide suitable tracks, rolling stock, and all other agencies required by the business which they assume to transact; and in this respect they must keep pace with science, art, and modern improvements in their application to the transportation of passengers. *Hutch. Carr.* above cited, §§ 524, 529; *Railroad Co. v. Newell*, 104 Ind. 264, 3 N. E. Rep. 836; *Railroad Co. v. Jones*, 108 Ind. 551, 9 N. E. Rep. 476. Any neglect of these requirements, which results in an injury to a passenger against which prudence and foresight might have guarded, renders a railway company liable. LIABILITY OF RAILWAY — DEFECTS. 1 *Lac. R. R. Dig.* 412, pars. 100-103, 110. There was consequently no error in giving the fourth instruction to the jury, so far as it relates to the requisite degree of skill and foresight. To constitute a person a common carrier, he must hold himself out as such. This may be done either by advertising or by engaging in the business of a common carrier, and the general acceptance of employment incident to such business. *Thomp. Carr. supra*; *Hutch. Carr., supra*, § 48. Having thus held himself out, he incurs certain obligations of a public or general character, which can only be met by a proper discharge

of the duties devolving upon him as a common carrier. As a consequence, whenever a quantity of goods or a passenger, by any of the usual methods, comes into the possession of a common carrier to be transported over his line, he, in the absence of any agreement to the contrary, assumes all the responsibility which the law attaches to the particular class of business which he has thus undertaken to perform. If it be a passenger, he impliedly agrees to exercise the utmost or highest degree of skill and foresight usually employed in his line of business for the same transportation of

CONTRACT. such passenger. When a duly-equipped passenger train of cars is placed upon a railway track, under circumstances indicating that it is ready to receive passengers, and that it is about to proceed on its way for the transportation of passengers, an invitation to all suitable persons to enter the cars, and to become passengers over its line, is thereby implied. This doctrine is in principle well sustained by the authorities. *Thomp. Neg.* 307; *Nave v. Flack*, 90 Ind. 205; *Railroad Co. v. Buck*, *supra*. When a person thus enters a railway car for the purpose of becoming a passenger, he has the right, in the absence of any stipulation or warning to the contrary, to presume that all the necessary precautions have been taken for his safe transportation, whatever the condition of the track may in fact be. In such a case the reasonable inference from the implied invitation to become a passenger is that all suitable precautions have been taken, and the acceptance of such an invitation cannot be held to be contributory negligence. See, again, *Hutch. Carr.* § 516. It is a matter of common observation that railway tracks are undergoing frequent, and in many cases constant, repairs, and that travel over them is very seldom suspended on account of ordinary repairs; also that, by an increased vigilance and care, passengers are usually carried safely over the places at which repairs are being made. A railway company is guilty of negligence when it at-

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TRACK.**

tempts to run its train of cars over a torn-up or palpably defective place in its track, when, by the use of such increased vigilance and care as is practicably available, the safety of its passengers is not well assured, and, for the reasons already given, the same rule is applicable to the management of street-railway lines of cars. Our conclusion, therefore, is that the eighth instruction, as applicable to certain features of the evidence in this case, stated the law correctly. Construing both instructions together we see no substantial cause for criticism, much less of complaint.

But the point is also made that the court erred, in the concluding part of its fourth instruction, in limiting what ought to be considered as contributory negligence to such negligence as may have directly and materially contributed to the infliction of the injuries complained of. This point is based upon the alleged ground

that so high a degree of contributory negligence is not required to defeat an action like the one under consideration. Beach, in his work on contributory negligence, at page 7, says: "Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of. To constitute contributory negligence there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury." To make such a want of care a proximate cause of an injury, it must, according to this well-considered definition, contribute directly and materially to the infliction of the injury. To constitute it a proximate ^{ORDINARY CARE.} cause, it must, in the nature of things, have some direct and material relations to the injury; and such has been our construction as to the degree of contributory negligence necessary to defeat an action like this. *Railway Co. v. Goddard*, 25 Ind. 185; *Company v. Sinclair*, 62 Ind. 301; *Nave v. Flack*, *supra*.

As has been stated, there was evidence tending to show that, after the street car ran off the first time, an employee of the street-railway company warned the plaintiff not to re-enter the car until after it had passed another point of danger in the immediate vicinity. There was further evidence tending to prove that the plaintiff replied that she had paid her fare and would take the risk. It is insisted, therefore, that the verdict was not sustained by sufficient evidence. In the first place, conceding that the plaintiff replied as stated, her agreement to take the risk was not made until after the contract for her safe transportation had already been broken. In the next place, the witness who testified to having warned the plaintiff, as well as to her reply, was flatly contradicted by other witnesses; thus presenting a case of conflict, in the evidence to be passed upon by the jury, and which we cannot review. In the third place, when an agreement on the part of the plaintiff to take the risk is relied upon as a defence in the class of actions to which this belongs, the agreement must be specially pleaded. *Railroad Co. v. Orr*, 84 Ind. 50; *Pfaffenberger v. Platter*, 98 Ind. 121.

The judgment is affirmed, with costs.

Negligence—When Presumed.—Plaintiff, while a passenger on one of defendant's railroad trains was injured by a wringer falling upon him from the rack above the seat. The wringer appeared in the rack simply as a parcel. *Held*, that a refusal to enter non-suit was error. *Morris v. N. Y. Cent. & H. R. R. (N. Y.)*, 13 N. E. Rep. 455.

In an action for injury caused by the falling of a window of a freight train on plaintiff while the train was passing along the street where plaintiff was standing, instructions assuming that this was so exceptional a case, that proof of the facts raised the presumption of negligence on the part of defendant. *Held*, erroneous. *Case v. Chicago, R. I., etc., R.*, 64 Ia. 762.

Whenever an injury is shown to have resulted from the breakage or defective condition of any railway appliances used in carrying passengers, or in the method of their use, a *prima facie* case of negligence is established.

Negligence is presumed from the fact that a car runs off the track. *Murphy v. C. I. & B. R.*, 36 Hun (N. Y.), 199; *Cent. R. v. Sanders*, 73 Ga. 573; *L., N. A., etc., R. v. Jones* (Ind.), 9 N. E. Rep. 476; *T. & St. L. R. v. Suggs*, 21 Am. & Eng. R.R. Cas. 475; *C., C., C. & I. R. v. Newell*, 28 Am. & Eng. R. R. Cas. 492, 501, note. See also 26 Am. & Eng. R. R. Cas., 179; 27 Id., 291, note; *Little Rock, etc., R. v. Miles*, 13 Id. 10; *N. Y. Cent. R. v. Seybolt*, 18 Id. 161.

Negligence is implied from fact of overturning of stage-coach. *Sanderson v. Frazier*, 8 Coe, 79.

The fact that a steamboat burst her boiler creates a presumption of negligence. *The Sydney*, 27 Fed. Rep. 119. See *Robinson v. N. Y. Cent. R.*, 6 Am. & Eng. R. R. Cas. 592.

Prima facie, the fact that a bridge gives way when a train is passing over it shows negligence. *B. S., etc., R. v. Rainbolt*, 99 Ind. 551.

But when the fall of a railroad bridge is caused by an act of God, a cloudburst, for instance, a railroad employee cannot hold the company liable, unless its negligence, to an extent amounting to a want of ordinary care, contributed to the disaster. *Rodgers v. Cent. Pac. R.*, 67 Coe. 607.

A carrier is required to provide safe appliances so far as practicable by the exercise of human care and foresight. *Ladd v. Foster*, 31 Fed. Rep. 827.

Negligence is presumed where accident is caused by defective construction of roadway. *Pershing v. C., B. & Q. R.* (Ia.), 32 N. W. Rep. 488.

When a passenger on a street-railway car is injured by a sudden jerk of the car in transit, there is a presumption of negligence on the part of the carrier. *Dougherty v. M. R. R.*, 81 Mo. 325; s. c., 51 Am. Rep. 239.

In a suit by a passenger against a railroad company for injuries caused by being thrown from a car by a sudden jerk of the train, after the plaintiff has proved these facts the burden of excusing it is on the company. *Condy v. St. L. & I. M., etc., R.*, 85 Mo. 79.

Giving away of track, *post facto* evidence of negligence in its construction. *Stoher v. St. L., I. M. & S. R.* (Mo.), 4 S. W. 389. See 26 Am. & Eng. R. R. Cas. 185.

In case of a collision between cars of a street railway, a presumption of negligence arises. *Smith v. St. P. City R.*, 16 Am. & Eng. R. R. Cas. 310.

Where a railroad accident results from a broken rail, all presumptions favor the negligence of the railroad company. *C., C. & C. R. Newell*, 104 Ind. 264; 28 Am. & Eng. R. R. Cas. 501, note; *L. & N. R. v. Riten's Admr.*, 28 Id. 169, 170, note. See also *L., N. H. & C. v. Jones*, 9 N. E. Rep. 476.

In an action against a railroad company where the complaint alleges injuries caused by a car thrown from the track by a defective rail broken several days before, the substance of the issue only need be proven, viz., that the track was unsafe by reason of the defective rail. *Tex. Pac. R. v. Kirk*, 62 Tex. 227.

A railroad company is not liable to one injured by an accident caused by the breaking of a rail owing to a concealed defect that could not have been discovered by inspection. *Anthony v. L. & N. R.*, 27 Fed. Rep. 724.

As to presumption of negligence in case of injury. See 27 Am. & Eng. R. R. Cas. 287.

FREEMAN

v.

DETROIT, MACKINAC AND MARQUETTE R. Co., Appt.

(Advance Case, Michigan. April 28, 1887.)

A railroad company having sold a ticket to a point on its road, including a return trip, was bound to stop at the station and bring the passenger back, upon the usual signal which had been recognized by the company being given; and it was the duty of the proper officers or employees of the company, upon the train, to be on the lookout, see the signal if it was given, and then to stop the train.

If the night was so stormy as to obstruct the road in the cuts, so as to render it unsafe for the defendant to stop its train without danger of having to stop a long time, that would be recognized by the law as an excuse; but the simple failure, on account of the storm, to see the signal which was given by the parties, would not be a just and lawful excuse. Under the admission of counsel, the court properly modified the instruction, and told the jury that, if the situation was such that the defendant's employees upon the train could not, in the exercise of due diligence and care, have seen the signal, the plaintiff cannot recover.

How. Stat. § 3324, renders a railroad liable for a failure to stop its train for the passenger holding a ticket over its road, where the proper signal has been given, and the company is without lawful excuse for the neglect.

ERROR to the Marquette circuit court to review a judgment rendered against defendant before a justice of the peace for a statutory penalty for refusing to transport a passenger, and appealed to the circuit court, where the judgment was affirmed. **Affirmed.**

The facts are given in the opinion.

Ball & Hanscom for defendant, appellant.

E. J. Mapes for plaintiff, appellee.

SHERWOOD, J.—This is an action brought by the plaintiff to recover of the defendant the penalty provided by statute in a case where the railroad company refuses to transport a passenger over its road without legal and just cause. How. Stat. § 3324 contains the provision which it is claimed furnishes the plaintiff with the foundation for her claim. The section will be found below.*

*Sec. 3324. Every such corporation shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer or be offered for transportation at the place of starting, and the junctions of other railroads, and at sidings, and at stopping places established for discharging and receiving way passengers and freight; and shall take, transport, and discharge such passengers and prop-

The cause was tried in the Marquette circuit, before Judge Grant, by jury, and the plaintiff obtained a judgment in her favor of \$100.

The circumstances of the case are quite fully stated in the charge of the circuit judge, and the principles of law applicable to
FACTS. to the facts are so well applied by him in his instructions to the jury that I give herein the charge entire, as embodying my views upon this record. It is as follows:

“The statute of the State provides that every railway corporation shall transport all persons from the various stations along its road, without partiality or favor, and with all practicable dispatch, under a penalty, for every violation thereof of \$100.

“The plaintiff in this case has sued to recover that penalty; she resided in the city of Marquette; she purchased a ticket over the defendant's line to a station upon its road called Rock River Kilns, and return; she went to this station, and claims that she offered herself to be brought back—transported back from Rock River Kilns to the city of Marquette—on the 23d day of January last, and that the train which usually stopped at that place came by without stopping and taking her on board. This it seems is what is called a way station, or flag station, where the trains did not stop unless there was freight or were passengers there to be transported, and then they stopped upon some signal that was to be given by those who had themselves to transport, or freight to transport, by the company.

“The defendant having sold this ticket to this plaintiff, to Rock River Kilns and return, was bound to stop there at the station known as Rock River Kilns and bring the plaintiff back.

“Considerable has been said in regard to the signal. There is evidence before you that this is a customary signal given at this station in the night, which was by taking lanterns and waving them across the track. There is evidence tending to show that the conductor had been in the habit of stopping this train for the purpose of taking on passengers, in accordance with that signal. If it was

erty at, from, and to such places, on the due payment of toll, freight, or fare, legally authorized therefor; and every such corporation shall transport merchandise, wood, lumber, and other property and persons from the various stations upon said road, without partiality or favor, when not otherwise directed by the owner of said property, and with all practicable dispatch, and in the order in which such freight and property shall have been received, under a penalty for each violation of this provision of \$100, to be recovered by the party aggrieved, in an action of debt against such corporation; provided that perishable or explosive freight and property shall have the preference over all other classes of merchandise. In case of the refusal by such corporation or agents so to take and transport any such passenger or property, as aforesaid, or to deliver the same or either of them, without a legal or just excuse for such default, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit, or the penalty prescribed in this section, at the election of the party aggrieved.

the usual or customary signal that had been agreed upon between the railroad and parties living there or parties coming there, that would be sufficient. It would not be necessary, in order to establish liability upon the company, that it should have given to the public a certain signal which it would acknowledge, and stop at this station. It would be sufficient if, in the course of travel, a certain signal had been recognized, given by the people and recognized by the company. It would be the duty on the part of the proper officers or employees of the defendant upon the train in question to have been on the lookout, seen the signal, if it was given, and then to have stopped the train. Neglect to see the signal would not be any defence to the corporation. It was their duty to be on the lookout and see the signal and stop the train. Passengers offered themselves to the defendant in this case, at this station, known as Rock River Kilns, when they placed themselves upon the platform by the side of its track, and gave the customary signal for the train to stop. Any running-by of the train without stopping, without any legal or just cause, as provided in the statute, would make the defendant liable to the penalty provided for by the statute.

"Now as to the legal and just defence. The defendant claims in the case that it was a stormy night, that the signal was not given, and that it was not seen.

"Now, gentlemen, I charge you that if it was a stormy night, and such as to obstruct the roads in the cuts that have been testified about by the witnesses, so as to render it unsafe for this defendant to stop its train without danger of having to stay a long time, that would be recognized by the law as an excuse; but the simple failure to see the signal on account of the storm, which was given by the parties, would not be a just and legal excuse.

"Therefore, gentlemen, it is for you to determine in this case whether the plaintiff did give the signal, or whether some party gave it for her, and whether it was given on the platform on the night in question. If the signal was given which was the customary signal, and this defendant ran its train by without any excuse, as I have charged you, then the defendant would be liable for the penalty.

"If you find for the plaintiff, it will be a verdict for \$100. If you find for the defendant, you will say simply that you find for the defendant.

"The plaintiff in this case must preponderate. She must prove to you, by a preponderance of evidence, that she gave the signal—that she gave the customary signal for them to stop; and also by a preponderance of evidence that there was no just excuse for the train to go by without taking her.

"Mr. Ball. Did I understand you to say that a failure to see the signal in any event would not be an excuse?

"Mr. Mapes. In this case I am willing for the court to leave it entirely to the jury whether they saw it or not.

"Court. Then, gentlemen, I charge you the law to be, under the admissions of counsel, that if the situation was such at this station, upon the night in question, that the defendant's proper employees upon this train could not, in the exercise of due diligence and care, have seen this light, that would have been a sufficient excuse for them; and if, under those circumstances, they did not see the light, then the plaintiff cannot recover."

It is claimed by counsel for appellant that the penalty prescribed by the section referred to does not apply to the default declared upon.

I am not able to concur in this view. The proviso contained in the section places that question beyond doubt or reasonable controversy, as I consider it.

The plaintiff held a ticket which entitled her to ride on the defendant's train between the two stations named; and when she went to the depot for the purpose of taking the coach, and was there in time so to do, and gave the proper signal for the train to stop, it was the defendant's duty to stop the train and take her on board; and her being there ready at the station was a sufficient offer of herself as a passenger on that occasion; and of this there is abundant testimony in the case. She could not offer herself as a passenger to enter a running train, neither could she do more than she did to obtain passage on that occasion.

The two exceptions taken to the rulings of the court in admitting testimony are not argued by the learned counsel for the defendant in their brief. We do not, therefore, consider them here.

No error appearing in the record, the judgment must be affirmed.

MORSE, J., concurred.

CAMPBELL, Ch. J.—I concur in the result.

CHAMPLIN, J.—I concur in the result upon the sole ground that there was evidence in the case from which the jury may have found that the trainmen saw the signal and wilfully ran by the station.

Failure to Stop at Station.—A passenger who goes to a flag-station on a railroad at night intending to take a train that has been in the habit of stopping at such station when signalled so to do, and the train does not stop for him, although the usual signal is given, he may recover the penalty of \$100, provided by How. St. Mich. § 3324, for the failure of the railroad company to "furnish accommodation for his transportation." *Freeman v. D., M. & M. R.* (Mich.) 32 N. W. Rep. 883.

In an action against a railway company for failure to stop at a station, the complaint should aver that under the regulations of the company the train should have stopped at the station. *O. & M. R. Co. v. Swarthout*, 67 Ind. 567; *Trottinger v. E. Tenn. R. Co.*, 11 Lea (Tenn.), 538; *Pitts., etc., R.*

Co. v. Nuzum, 50 Ind. 141; Martindale v. Kan. City, etc., R. Co., 60 mo. 508.

Act of God.—Where a railroad company is prevented from stopping by an act of God, the company is not liable.

As to an injury being caused by an act of God, see B. & O. R. v. School Dist., 2 Am. & Eng. R. R. Cas. 166; I. & G. N. R. v. Halloren, 8 Id. 343; Gates v. N. Y. C. R., 2 Id. 237; H. & T. C. R. v. Fowler, 8 Id. 504; D. & R. V. R. v. Brown, 11 Id. 101; Ely v. St. L., K. C. & N. R., 16 Id. 342; Norris v. S. F. & W. R., 28 Am. & Eng. R. R. Cas. 66; Davis v. W., St. L. & P., 26 Am. & Eng. R. R. Cas. 315, 322, note.

Where the railroad company's negligence has contributed to accident, the company is liable. Davis v. C. V. R., 11 Am. & Eng. R. R. Cas. 173; Ellet v. St. L., K. C. & N. R., 12 Id. 183; McDermott v. H. & St. J. R., 28 Am. & Eng. R. R. Cas. 528.

Generally, as to act of God, see 1 Am. & Eng. Encyc. of Law, 173.

HARMON

v.

WASHINGTON AND GEORGETOWN R. Co.

(*Advance Case, District of Columbia. July 11, 1887.*)

An instruction is objectionable which assumes the existence of any disputed fact.

The ordinary rule that hypotheses not supported by any evidence are not to be submitted to the jury as the basis of a conclusion in arriving at a verdict, becomes all the more important when the hypothesis is of conduct utterly inexcusable.

In an action to recover damages from a street-railway company, for a personal injury, the defendant must prevail if it appear that when plaintiff signaled the conductor to stop the car, the conductor rang the bell for that purpose, and the car immediately began to slow down, and that plaintiff, without waiting for the car to stop, undertook to and did step from the car while it was still in motion. It is, therefore, error to refuse an instruction involving this proposition, if based upon evidence in the case.

The question whether defendant was first guilty of negligence should be submitted to the jury before allowing them to consider whether plaintiff was guilty of contributory negligence, since the submission of the latter question involves an assumption that there was already negligence on the other side.

MOTION by defendant for new trial on bills of exception. Granted.

Action to recover damages for a personal injury alleged to have been caused by the negligence of defendant company.

The facts are stated in the opinion.

Enoch Totten for defendant.

Luther H. Pike for plaintiff.

JAMES, J.—This is an action to recover damages for injuries alleged to have been caused by the negligence of the defendant in failing safely to land and deliver the plaintiff as a passenger on its road. It appears that the plaintiff boarded one of the defendant's cars on Pennsylvania avenue, to ride to Nineteenth street. As to what happened at his stopping place there was, of course, a conflict of evidence.

On the part of the plaintiff there was evidence tending to show that when he approached Nineteenth street he signaled the conductor of the car to stop, and that the conductor thereupon rang the bell and the motion of the car began to slack, and that he arose to go out of the car, and that the platform was crowded with passengers; that there were at least eight or ten passengers on the platform, and two, a man and a boy, were standing on the step of the car against the rails, the boy standing next the body of the car, and the man standing on the other end of the step next the dash or railing at the rear end of said car; that he crowded his way through the crowd on the platform, and stepped down on the step while the car was still in motion, but moving very slowly; that he was unable to get hold of either of the railings because the man and boy were so standing on the step, and that after he had been waiting for the car to stop, the conductor rang the bell and the car suddenly started forward, and there was a sudden jerk of the car that threw him off upon the street; that at the time plaintiff signaled the conductor to stop the latter was engaged in figuring up his accounts, and was standing with his back to the rear door, leaning against the jamb, and, after ringing the bell to stop, remained standing inside the car and did not go out to assist plaintiff off the platform or step, and that while plaintiff was standing on the lower step of the car the conductor rang the bell from the inside, and the car started forward with a jerk and threw him off.

The plaintiff himself further testified that this was about 9 o'clock at night; that he was in the habit of riding home on this line of cars and sometimes with this same conductor; that on this occasion the car was so full that he could not easily get through the crowd in the time the conductor gave him, but he finally got upon the lower step, crowding his way between a man and a boy standing on that step, and was prevented from getting hold of anything to support himself by reason of their positions; that plaintiff was not in the habit of getting off a car while it was in motion, and did not do so on this occasion, but was jerked off by the jerking forward of the car while he was waiting for it to come to a full stop; and finally that there were more than a dozen passengers inside the car.

On the part of the defendant there was evidence tending to show that only thirty-five passengers rode on that car at any time be-

tween the Navy Yard and Georgetown; that these got on and off from time to time; that a majority of them got off at the corner of Fifteenth street and New York avenue; that only five or six were inside the car at the time of the accident; that the plaintiff was in the habit of riding on defendant's cars and landing at Nineteenth street, and in the habit of getting off while the car was in motion; that, at the time in question, the plaintiff signaled the conductor to stop; that the conductor rang the bell and the car began to slow down; that the conductor was standing on the rear platform when so signaled, and that when the bell was rung no other person was standing there except a small boy; that the plaintiff, after signaling, and without waiting for the car to stop, immediately went on to the platform and stepped down on the step, and, while the car was yet in motion but almost at a stand, stepped off on to the street, and then fell. The conductor himself speaks, we suppose, when the record adds, "That the conductor, while the plaintiff passed out on to the platform had hold of the bell-rope, and was watching the plaintiff, and as soon as the plaintiff alighted upon the street and was free from the car, the conductor pulled the strap and the bell for the driver to start, but seeing the plaintiff fall, the conductor immediately rung the bell and the car stopped before proceeding half its length."

As to the capacity of this car, there was evidence that there were seats inside for twenty-two persons.

Although this cause is not before us on a case stated, we have found it necessary to state at some length the testimony set out in the bills of exception, in order to consider the relevancy and effect of the instructions to the jury to which exceptions were taken.

The following instruction, given at the instance of the plaintiff, is the first point of objection by the defendant.

"3. If the jury believe from all the evidence that the plaintiff requested the conductor of the car, on which he was a passenger, to let him out at or near Nineteenth street, on Pennsylvania avenue, in the city of Washington, and thereupon the conductor rang the bell while inside the car, and remained there in a position where he could not ascertain whether the plaintiff had descended safely from the car or not, and rang the bell to start before the plaintiff had alighted from it, and the plaintiff was thrown, or jostled therefrom while attempting to get off, by the sudden movement of the car, and thereby injured, the defendant would be responsible for his injuries, and the plaintiff be entitled to a verdict."

INSTRUCTIONS
ASSUMING DIS-
PUTED FACTS.

It is objected that this instruction assumes as a fact that the position of the conductor, if he did ring the bell inside the car and did remain there, was one which prevented him from seeing whether the plaintiff had descended safely from the car, when he rang the bell for starting. Such a fact is so important that it is

very material that it should not in any degree be taken from the determination of the jury. We are of opinion that the instruction was on that account objectionable.

The next exception is to the following instruction :

"4. It was the duty of the conductor to see that the car was not so crowded, either inside or on the platform, as to impede or interfere with the departure in safety of passengers from it ; and if the car was so crowded, it was the duty of the conductor to make room for the plaintiff to get off in safety, and to await his safe descent from it to the ground, before giving the driver the signal or sound for starting the car ; and if he neglected or failed to do so, it was negligence on his part for which the defendant is responsible, provided, as a consequence of such failure or neglect, if it existed, the plaintiff received the injuries of which he complains in his declaration."

In the charge to the jury the court added the following comments upon this instruction : to which, also, exception was taken :

"I conceive that to be correct law. A party taking his seat in one of these cars is entitled to have such use of his seat, and of his person, upon leaving the car, as will enable him to do so in safety ; and if the car is overcrowded inside, so that he is delayed a long time in getting off, and is unable to get off in safety, or if there is a crowd on the platform against the railing of the car, and in consequence of either of these circumstances he is unable to get off in safety, then that would constitute a case of negligence, on the part conductor, for which the defendant would be responsible. It is perfectly absurd for them to content themselves with sticking up notices that the cars are not to be overcrowded, and then allow them to be overcrowded".

We think that the inevitable effect of the original instruction, and, still more, of the comments by which it was enforced, was to present to the jury, as a matter which demanded their consideration, and which they might find to be a cause of the injury, an overcrowding inside of the car, which had the effect to delay the passenger a long time in getting off, so that he was unable to get off in safety. There does not appear to have been any evidence at all from which the jury could have a right to conclude that there was overcrowding inside, but did not intimate that this number constituted overcrowding, or that it in any way affected his movements. The very fact that such overcrowding inside of these cars would constitute an outrage upon the rights of the public which could only excite the indignation of a jury, would cause an assumption that it had occurred in the case at bar to have some effect upon their minds. The ordinary rule that hypotheses which are not supported by any evidence are not to be submitted to the consideration of a jury, as the basis of a conclusion in arriving at

a verdict, becomes all the more important when the hypothesis is of conduct so utterly inexcusable.

The most important exception, however, was to the refusal of the court to give the following instruction asked for by the defendant:

"7. If the jury shall be satisfied from the evidence that when the plaintiff signaled to the conductor to stop the car the conductor rang the bell for that purpose, and the car immediately began to slow down its speed, and that the plaintiff, without waiting for the car to stop, undertook to and did step from the car while it still was in motion, and was injured, he cannot recover, and the defendant is entitled to a verdict."

The situation submitted by this prayer was, that the plaintiff had signaled the conductor to stop the car, and that the conductor had rung the bell for the purpose of stopping, and that the car was slowing down in execution of that purpose. The case supposed was, in short, that the defendant was actually complying with its duty of stopping for the passenger to get off, and that, while the defendant was thus performing its duty (in other words, was not in fault) the plaintiff elected to get off without waiting for the completion of the defendant's duty.

QUESTION OF
NEGLECT TO
BE SUBMITTED
BEFORE CON-
SIDERING CON-
DUCT.

The case presented would be one in which the defendant had not yet been guilty of any negligence. In such a case it would be irrelevant to inquire whether the plaintiff's own conduct amounted to negligence, and was thereby a contributory cause of the injury. It would be enough that, if the case existed as supposed, the defendant's acts would not be the cause at all of the injury supposed.

The effect of the rejection of this prayer is rendered the more marked by the fifth instruction actually given, at the instance of the plaintiff, in the following words:

"If the jury believe from all the evidence that the car on which the plaintiff was a passenger had not entirely stopped when he reached the lower step or nearly so, and that it was moving slowly or very slowly, the getting off of the plaintiff at that time would not of itself relieve the company of the responsibility, and it will be for the jury to consider and determine, in view of all the facts and circumstances, whether it was negligence on the part of the plaintiff to attempt to get off before the car had entirely stopped and while it was moving at reduced speed and slowly, if he did so."

This instruction contains an assumption that the defendant had done something for which it was responsible—in other words, had omitted some duty; and the particular implication seems to be that the car was merely slowing up, and was not in process of actually stopping in order that the plaintiff might alight safely. We think

the question whether the defendant's act involved an omission of care—in other words, whether the defendant was coming to a full stop, should have been submitted to the jury, before they should be allowed to consider whether the plaintiff's conduct in getting off while the car was in motion was contributory negligence. To put the latter question as it was here put involved an assumption that there was already negligence on the other side.

For these reasons judgment is reversed and the cause is remanded for a new trial.

Jumping from Moving Street Car.—It is contributory negligence for a passenger to leap from a moving street car, though the conductor has not complied immediately with his request to stop the car. *Hogan v. Phil. & S. F. R.*, 15 Phila. 278.

Boarding Moving Street Cars.—Plaintiff, in attempting to board a street car, fell by reason of the car being started before he got on. *Held*, that the questions determining the right of action were whether he exercised care and prudence, and whether the conductor carelessly started the car too soon. *Van de Venter v. Ch. City R.* 26 Fed. Rep. 32.

If a conductor has reason to believe that any passenger who has reached his destination, though dilatory, may be in the act of alighting, and he starts his train without examination or inquiry and such passenger is thereby injured, the company will be liable. *Straus v. K. C. & St. J.*, 86 Mo. 421; s. c. 27 Am. & Eng. R. R. Cas. 170.

For negligence *per se* to get on front platform of a horse car, while car is moving slowly, whether act is negligence depends upon circumstances. *McDonough v. Met. R.* 137 Mass. 210; s. c. Am. & Eng. R. R. Cas. 354.

It is not necessarily contributory negligence to get on or off a moving street car. The question must be determined by the circumstances. *C. C. Ry. v. Mumford*, 3 Am. & Eng. R. R. cas. 312; *McDonough v. M. R. R.*, 21 Am. & Eng. R. R. Cas. 354; *Eppendorf v. B. C. R.*, 69 N. Y. 195. See 21 Am. & Eng. R. R. Cas. 357, note; s. c., 25 Am. & Eng. R. R. Cas. 364.

Contributory Negligence.—Until a *prima facie* case of negligence is made out there can be no question of contributory negligence. *Simms v. S. C. R. (S. C.)*, 2 S. E. Rep. 486.

Instructions to the jury must be based upon facts. See 26 Am. & Eng. R. R. Cas. 385.

As to boarding and leaving moving trains generally, see note to *P. R. R. v. Peters*, *supra*.

COMMONWEALTH

v.

BROCKTON STREET R. CO.

(*Advance Case, Massachusetts. February 23, 1887.*)

The driver of a horse car of the defendant company, after being relieved by another driver, started to leave the car, and in so doing negligently came in contact with a passenger standing on the steps of the platform, so that

the passenger fell from the car and was run over and killed. In an action to recover the penalty imposed by statute for the loss of life, *held*, that the driver while leaving the car was still the servant and acting within the scope of his employment, and the company was responsible.

INDICTMENT against the defendant under Public Statutes, chapter 112, section 212, to recover the penalty imposed by the statute for the loss of the life of Edward B. Allen, a passenger on the defendant road. The indictment contained three counts. The first count was quashed by order of the superior court upon defendant's motion. In the second count it was alleged that the defendant on March 10, 1885, was the owner of a street railway operated by it, extending along Main street in Brockton, and was a common carrier of passengers; that on said March 10, a horse car was driven along the track of said street railway, the said car and the front platform and steps thereto attached being heavily laden with passengers; that by reason of the unfitness and gross negligence and carelessness of the servants and agents of defendant corporation, the said servants and agents drove said car at a high and extraordinary rate of speed, and that one of said servants, Charles E. Fenner, with gross negligence and carelessness and while engaged in the business of said corporation, while the car was being driven at a high rate of speed near the junction of Nilsson street, got off the front platform and the steps thereto in a grossly negligent and careless, hasty and improper manner; that Edward B. Allen was a passenger on said car and was standing upon one of the steps of the front platform, and that by reason of the gross negligence and carelessness of the servants and agents of the corporation, and by reason of the unfitness, gross negligence and carelessness of the said Charles E. Fenner in getting "off from said platform and steps Edward B. Allen was thrown down from the steps upon the track of the railway and was struck and run over by the wheels of the car and injuries were received so that he died on the 12th of March following."

The third count was similar to the second count, except that it alleges that the said Allen, by reason of the unfitness and the gross negligence and carelessness of the servants and agents of the defendant, was pushed and thrown off said car upon the track, and was struck and run over by the wheels of said car, receiving injuries from the effects of which he died. At the trial in the superior court the defendant moved to quash the second and third counts of the indictment. The court overruled the motion, and defendant excepted.

Among other evidence offered by the Commonwealth at the trial was the following:

Leander M. Varney testified that he got on the car which Fenner was driving on the morning of March 10, at twenty-three

minutes to seven o'clock, the car being crowded; did not know whether car was driven slowly or rapidly; spoke with Allen after he got on; he got on the lower step; saw the other driver named Ashley; Fenner gave up the reins to Ashley near Nilsson street; Fenner got off on the right hand side; Allen at the time was on the lower step of the car; Fenner started to get off the car when he gave up the reins to Ashley; the car was in motion; saw Allen on the ground; saw him fall; he stepped backward toward the horse's head; he had his hands in the air; Allen and I were on the same step together; Fenner gave up the reins, stepped on step and went behind me; there was plenty of room for any one to get off the car; the car went twelve feet after the accident.

Webster Howard testified that he was traveling on the horse car on the morning of March 10, 1885; that Fenner gave reins to Ashley and got off in a hurry; that he saw Allen fall when Fenner got off; that the car was in rapid motion.

Among other evidence for the defence was the following: Alson G. Ashley testified: Relieved Fenner that morning; stepped on and took reins in my hand; Fenner had reins in left hand, and right hand on brake; I took the brake in right hand and reins in left; the first I knew a man dropped off the step, and that man was Allen; I stopped the car as quickly as possible; drove car about seventy-five feet after the accident; took reins less than one hundred feet before that; Fenner's boarding place was on Pond street; relieved him to let him go to breakfast; I got on car intending to take the reins before reaching Nilsson street, in order to let Fenner go to breakfast; when he got off car was in motion.

Charles E. Fenner testified: Was car driver on March 10; Allen got on car on front platform on lower step; Ashley got on lower step on left-hand side; he took brake after I stepped back and gave up the reins; I stood about one-half a minute; stood back against the door of the car; I stood there without moving; I then saw Allen off the car; he had hold of the car with both hands; he was hanging on and running along sideways; saw him trip and lose his footing and drag; saw him let go his hold and swing under the car; I stood still till the car was braked up; I gave up reins one hundred and sixty feet from Nilsson street; I quietly got off the car when it stopped.

At the conclusion of the evidence the defendant requested the court to instruct the jury as follows: If the jury find that at the time Fenner was attempting to get of the car he was not engaged in the business of the street railway company, they must under this indictment return a verdict of not guilty, even though they should find that the other driver was guilty of gross negligence and carelessness and unfit for his duty, and also that upon the evidence the jury should return a verdict of not guilty. The court

declined to give these instructions, but did instruct the jury as follows:

If the jury find the cause of Allen's fall was that he was pushed off or struck against by Fenner as Fenner was in the act of leaving the car, and that Fenner's act at the time and in the way in which you shall find that it was performed was a grossly negligent and careless act, then it would be sufficient to fix the liability of the defendant upon this indictment, if at the time Fenner was engaged in the business of the company, and this is a question of fact.

If the driver, after relinquishing his charge and control of the horse and the reins and appliances to his successor, immediately starts to leave the car in pursuance of a common intention between him and the driver to whom he relinquished the same, in order that the latter should then and there assume his turn at the driving, rather than at any other time and place to enable the first driver then and there to leave his work and the car, the act of the first driver in so leaving the car may be found to be an act performed when he was in the business of the company.

But if there was no present intention on the part of Fenner to leave the car immediately upon relinquishing the driving, he remained upon the car to be carried on to the place of his destination; his act in leaving the car subsequently, when that place of destination was reached, would not be an act done while engaged in the business of the company. The defendant alleged exceptions to the rulings and refusals to rule of the presiding judge.

B. W. Harris and R. O. Harris for Commonwealth.

H. Kingman for defendant.

GARDNER, J.—The second and third counts of the indictment are sufficient. The only specific objection made at the argument, that there is no averment that the life of Allen was lost by reason of the unfitness, gross negligence and carelessness of any servant or agent of the corporation, is not sustained. Each count alleges that, by reason of the unfitness, gross negligence, and carelessness of one Fenner, who is alleged to be the servant of the defendant corporation and engaged in its business, the life of Allen was lost. The motion to quash was rightly overruled.

The facts show that the driver Fenner was relieved by one Ashley, to enable Fenner to go to his breakfast. Fenner was in the employment of the defendant corporation, as a driver of one of its horse-cars. To perform the duty it was necessary for him to go upon the car, and it was also necessary that he should leave the car when he went to his meals, and when his service was completed for the day. We do not think that he was exclusively within the scope of his employment when he was handling the reins and driving the horses.

INDICTMENT SUFFICIENT.

DRIVER ACTED WITHIN SCOPE OF HIS EMPLOYMENT.

When going upon the car for that purpose, and when leaving it after he had stopped driving, he was within the scope of his employment. His employment was continuous, and his service began when he stepped upon the car for the purpose of driving the horses, and continued until he left the car, immediately at least after giving the reins and horses in charge of another driver. If in going upon the car to act as driver, or in leaving the car at once after ceasing to be driver, he negligently and carelessly came in contact with a passenger, by reason of which the passenger suffered injury, we think that the driver, in so doing, was a servant of the corporation, was acting within the scope of his employment, and that the corporation was responsible to the passenger injured for the negligent acts of its driver. The company was liable for whatever injury occurred to a passenger through the negligence and carelessness of their servant in doing what was necessarily incident to his employment. If it should be held otherwise, passengers upon horse-cars might be subject to the brutality of one in the service of the corporation, whom the corporation places upon the cars and yet for whose acts while upon the car the corporation would not be liable unless he held the reins in his hands and was actually driving the horses at the time of his careless and negligent act. The instructions prayed for were properly refused, and those given were sufficiently favorable to the defendant.

Exceptions overruled.

Assault by Servant.—A passenger on a street-car who is wilfully and wantonly assaulted by the driver, thrown off the car and run over may maintain an action against the company for his injuries. *Winnegais Admr. v. Cent. P. R. (Ky.)*, 4 S. W. Rep. 237.

As to liability of master for negligence or wrongful act of servant see *W. & A. R. R. v. Turner*, 28 Am. & Eng. R. R. Cas. 455.

WILLIAMSON

v.

CAMBRIDGE R. Co.

(Advance Case, Massachusetts. February 26, 1887.)

The declarations of a conductor of a street car, made immediately after the accident, to the effect that it was his fault that it occurred, are inadmissible in an action for damages against the company.

Secondary evidence may be given of the contents of a written application for insurance, made and signed by the party, when the original cannot be obtained.

ACTIONS of tort, the first by Elizabeth R. Williamson, to recover for personal injuries received by her, and the second by George Williamson, to recover for loss of his wife's services, and the expense of her care and cure. The actions were tried together in the superior court. At the trial the plaintiffs introduced evidence tending to show that defendant's horse car—it being an open car—having arrived at or near its usual place for stopping in Bowdoin square, in Boston, came to a full stop, and then the female plaintiff proceeded to alight from the car, and that, while she was in the act of doing so, defendant's conductor struck the bell, started the car, and thus threw her to the pavement, and caused the injuries complained of. The whole evidence as to whether defendant's car was at a full stop when the female plaintiff attempted to alight therefrom was conflicting.

The evidence also tended to show that the female plaintiff lost consciousness for a moment on striking the pavement; that several persons immediately came to her assistance, and, among them, the conductor, who said: "I am very sorry, madam; that was my fault." Evidence of such admissions of defendant's conductor was objected to. The plaintiffs contended that the conductor's remark was made at a time so near the act of starting the car and the fall of the female plaintiff, within a second or so, that it was a part of the *res gestæ*. The court excluded the evidence.

The defendant offered the testimony of an agent of a foreign insurance company, who testified in substance that he solicited from her, at a date subsequent to the injury complained of, an application for a two hundred dollar policy in the company that he represented, that she made such application and that he had with him on the stand a blank application such as was used by him at that time; that he asked her the usual questions and wrote down the answers on the blank, which she afterward read and signed; that the original blank application thus filled and signed was at the home office in New York; that he had made efforts to get the original from the home office, but that instead of the original what purported to be a copy thereof was sent him, which he now produced; that it was an exact copy of the original, signed by Mrs. Williamson. Defendant then offered the copy in evidence, and the court admitted it. The verdict was for the defendant, and the plaintiffs alleged exceptions to the rulings of the presiding justice.

S. H. Dudley for plaintiffs.

S. Hoar for defendants.

W. ALLEN, J.—This case cannot be distinguished from *Lane v. Bryant*, 9 Gray, 245. That was an action for injury to the plaintiff's carriage by collision with the defendant's wagon, driven by his servant. A witness was asked, "What the servant said to the

plaintiff at the time of the accident, and while the plaintiff was being extricated from his carriage, and while the crowd was about." The reply, that the servant said the plaintiff was not to blame, was admitted, and an exception to its admission was sustained. Mr. Justice Bigelow, in delivering the opinion of the court, said, in language which well applies to the case at bar: "The declaration of the defendant's servant was incompetent, and should have been rejected. It was made after the accident occurred and the injury to the plaintiff's carriage had been done. It did not accompany the principal act or tend in any way to elucidate it. It was only the expression of an opinion about a past occurrence, and not part of the *res gestæ*. It is no more competent because made immediately after the accident than if made a week or a month afterward."

In the case under consideration the plaintiff relied upon the act of the conductor in ringing the bell and starting the car while the plaintiff was leaving it, to prove negligence in the defendant. The words of the conductor did not form part of that transaction, or in any manner qualify his act, or any act of the plaintiff. They were in form and substance narrative, and expressed an opinion upon a past transaction. The words, if competent as an admission, might have been evidence to show what the character of the transaction was, but they did not enter into it and give it character any more than would the declaration of the conductor that he had not been in fault, or that the plaintiff had been. In the opinion of a majority of the court, the evidence was properly excluded.

The contents of the application for insurance by the plaintiff were provable by secondary evidence. *Binney v. Russell*, 109 Mass. 53. Any secondary evidence was competent. *Goodrich v. Weston*, 102 Mass. 362. The witness produced a paper which purported to be a copy of the application made by the plaintiff, and which contained printed questions and written answers thereto. He testified that he took the plaintiff's applications, using a printed blank such as that produced; that he wrote down her answers on the blank, which she afterward read and signed, and that the paper produced was an exact copy of that signed by the plaintiff. We think that the evidence was sufficient to authorize the admission of the paper in evidence. The printed questions were clearly admissible. It is equally clear that oral testimony of the contents of the written answers was competent. The witness could state orally from memory what the answers were. It was in the discretion of the court to allow him to write down the answers, which he remembered had been written by him and read and signed by the defendant in the places upon the printed form in which they were in the original paper. If he could write them himself he could testify to their correctness when written by another. The paper did not go

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to the jury as an examined copy, authenticated by comparison with the original, and of itself evidence, but as showing what the original was as testified to by the witness from his recollection of it. We think that it was within the discretion of the court to allow it to go to the jury.

Exceptions overruled.

Declarations of Agents and Servants.—The declarations of agents and servants of the railroad are admissible when made contemporaneously with the happening of the accident, as forming part of the *res gestæ*. *H. R. R. v. Coyle*, 55 Pa. St. 396; *Mullan v. P. & S. M. S. Co.*, 78 Id. 25; *McLeod v. Ginther*, 80 Ky. 399; 15 Am. & Eng. R. R. Cas. 291; 8 Id. 162; *Casey v. N. Y. C. & N. R. R.*, 78 N. Y. 578; *Penn. Co. v. Rudel*, 100 Ill. 603; 6 Am. & Eng. R. R. Cas. 30. See *Durkee v. C. P. R. R.*, 25 Am. & Eng. R. R. Cas. 350. Thus, the declarations of a switchman, made immediately after an accident by which he has been knocked down and while he is still under the car, touching the cause of the accident are competent as part of the *res gestæ*. *L. R., M. R. & T. R. v. Leveret* (Ark.), 28 Am. & Eng. R. R. Cas. 459.

In an action for lost baggage against a carrier evidence of the statement made by defendant's baggage-master to plaintiff's salesman as to how the fire occurred which destroyed the baggage, *held*, admissible as part of the *res gestæ*. *Ill. Cent. v. Troustine* (Miss.), 2 So. Rep. 255. Declarations of conductor made just before collision showing the situation of the train are admissible as part of the *res gestæ*. *Ch. & E. I. R. v. Holland* (Ill.), 13 N. E. Rep. 145. But declarations made after the happening of the accident are not admissible.

In an action for injury caused by defect in track, evidence that defendant's section foreman had said that the track was bad at the place of accident is not admissible when it appears that it was not said at the time and place of the accident. *Worden v. Humeston S. R.* (Ia.), 33 N. W. Rep. 629; *Smith v. St. L., I. M. & S. R.* (Mo.), 3 S. W. Rep. 836.

In an action for negligence, statements made by a servant of the defendant in a conversation with plaintiff after the accident are no part of the *res gestæ* and are inadmissible. *Sherman v. D., L. & W.* (N. Y.), 13 N. E. Rep. 616. *Cetrie v. C. & G. R.* (S. C.) 2 S. E. Rep. 837. See also *P., C. & St. L. R. v. Wright*, 5 Am. & Eng. R. R. Cas. 628; *Moore v. C., St. L. & N. O. R.*, 9 Am. & Eng. R. R. Cas. 40; *Dietrich v. B. & H. S. R.*, 11 Am. & Eng. R. R. Cas. 115; *Adams v. H. & St. J. R.*, 7 Am. & Eng. R. R. Cas. 414; *Patterson v. W., St. L. & P. R.*, 18 Am. & Eng. R. R. Cas. 130; *A. G. S. R. v. Hawk*, 18 Am. & Eng. R. R. Cas. 194; *McDermott v. H. & St. J. R.*, 2 Am. & Eng. R. R. Cas. 85; *U. P. R. v. Fray*, 29 Am. & Eng. R. R. Cas. 309, 316, note; *Devlin v. W., St. L. & P.*, 28 Id. 524; see 27 Am. & Eng. R. R. Cas. 239; see *Lacey's Dig. R. Dec.* 306.

Declarations made in the course of the servant's duty are admissible. Where an engineer made a report of an accident to his superior officer, and stated the circumstances of its occurrence, which report was required by the rules of the railroad company, it was held to be admissible. *Keyser v. C. & G. T. R.* (Mich.) 33 N. W. Rep. 867. See *B. & O. R. R. v. State*, 19 Am. & Eng. R. R. Cas. 83.

As to declarations of person injured, see 28 Am. & Eng. R. R. Cas. 561, note; *Waldele v. N. Y. C., etc., R.*, 95 N. Y. 274; *Martin v. N. Y., N. H. & H. R.* (N. Y.), 9 N. E. Rep. 505.

SIDEKUM and Others

v.

WABASH, ST. L. AND P. R. Co.

(Advance Case, Missouri. June 20, 1887.)

The denial of defendant's motion for a physical examination of a female plaintiff by physicians, in an action against a railroad company for damages for personal injuries, is discretionary with the trial court.

Upon an action against a railroad company for damages for personal injuries sustained in an accident, evidence was given for plaintiff as to the condition of the track a mile and a half from the place of the accident. *Held*, that, while such evidence was incompetent and inadmissible, yet the error was cured by an instruction limiting the consideration of the jury to the defects specifically charged in the petition.

In an action for personal injuries, an instruction, on the measure of damages, that it is the jury's duty to consider the plaintiff's physical condition before and since the injuries, the physical and mental pain suffered on account of the injuries during the same time, the amount of future pain to arise therefrom, together with all other circumstances shown in evidence, and considering all the circumstances aforesaid, is proper.

In a civil case, where the damages awarded by the verdict do not appear to be excessive, and no objection was made or exception saved, and no ruling of the trial court had, an appellate court will deem that an objection which might have been interposed to the remarks of opposing counsel in their closing argument was waived.

APPEAL from circuit court, Buchanan county.

Woodson, Green & Burnes for respondent.

W. H. Blodgett for appellant.

RAY, J.—Plaintiffs, who are husband and wife, brought this action in the circuit court of Buchanan county, Missouri, to recover damages for personal injuries to the wife, while travelling, as a passenger, on a freight train of defendant, between the stations of Lathorp or Converse and Lawson, on the twenty-fourth day of July, 1883. Upon a trial of the cause, plaintiffs obtained a verdict and judgment in the sum of \$6000, from which defendant has prosecuted this appeal to this court.

The grounds relied on for a reversal of the said judgment as stated by counsel for defendant are: First, that the court erred in overruling its application for a personal physical examination of the wife, the real plaintiff; second, that the court erred in admitting testimony concerning the bad condition of appellant's track at other places than that where the accident occurred; third, in giving instruction No. 3 at plaintiffs' request; and, fourth, in per-

mitting plaintiffs' attorney, in his closing address, to remark upon things outside of the record calculated to excite the prejudices of the jurors, and to deceive and mislead them as to the law concerning the measure of recovery.

In a case involving a similar application as the one mentioned in said first exception, this court expressed the opinion, modifying a previous ruling had in *Loyd v. Railroad*, 53 Mo. 515, EXAMINATION OF PERSON. that while the party had no absolute right to such personal examination, and the court could not compel the party to submit thereto, the court may properly, in the exercise of its discretion, order such an examination to be made, in a proper case, and enforce its order in the several ways there specified; and that the exercise of its discretion in that behalf would not be interfered with by this court unless manifestly abused. *Shepard v. Missouri Pac. Ry.*, 85 Mo. 634. In that case the court say: "The order asked by defendant was unreasonable, in that it asked that this lady should submit to a personal examination, not by one skilled surgeon, but by at least three." This and other observations and rulings in said case would seem to control the application in this case, which was "for an order that said female plaintiff submit her person to an examination of physicians to be named by defendant, not exceeding four in number." It further appears, in this case, that said motion, having been filed on the day before the trial, was taken up and heard by the court when the cause was called for trial on the next day, and that the court denied the motion at that time; remarking that if, during the progress of the trial, it appeared necessary to ascertain the real condition of plaintiff, and the nature and extent of her injuries, he would then direct an examination by physicians.

The witnesses testifying for plaintiff upon the subject of her health and condition, both before and after the injury on the railroad, were the female plaintiff, Hannah Sidekum, in her own behalf; her step-mother, Mrs. Harrison; and the family physician, Dr. Bane. Omitting consideration of the testimony of the other witnesses, that of Dr. Bane, delivered before the trial judge, who was, we may assume, personally acquainted with him, and knew his reputation as a physician, was, in general and substance, that he had practiced in the family of Mrs. Sidekum for 12 years; that he was called to see her immediately upon her arrival in St. Joseph, and found her suffering great pain from introversion or dislocation of the womb; the womb pressing on the bladder; surrounding parts inflamed, and some external bruises, the more serious ones being located on the abdomen and back part of the body; that he attended at her house over two months, seeing her nearly every day; that an abscess formed in two or three weeks after the injury, with a discharge through the soft parts, which had not healed when he last saw her, some three or four weeks previous to

time of giving his testimony; that her condition was much improved; that he did not regard her condition incurable, as it is curable in some cases, but that the probability was that the injury would be permanent; that she was still under treatment, although he was not visiting her at the time of the trial. He also testified that prior to the accident she had been sound and healthy; that, in the course of his 12 years' attendance as her physician, he had made, prior to the accident, several examinations of the womb, which examinations were occasioned by some symptoms of which she complained, and which he thought made such examinations necessary, but that upon personal examination he had found those organs healthy and strong.

The action of the trial court upon said motion, as we have seen, was merely a refusal to grant the same for the time being, and as defendant did not again renew its application for such order, at any other stage of the proceeding, the court may have well concluded that after hearing the said evidence in the cause introduced by plaintiff, including that of Dr. Bane, which we have given in substance, defendant did not deem it necessary to renew its motion, or to insist thereon, but had abandoned the same.

We will now proceed to the second of said exceptions, as to the admission of evidence, in plaintiff's behalf, as to the condition of the railroad at places other than that of the accident.

In the recent case of *Stoher v. St. Louis, I. M. & S. R.*, ante, 389, a somewhat analogous question was involved. This

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OF TRACK. court there announced its disinclination to adhere to the rule in all its strictness, which is held in numerous cases, and which limits the party to the precise time or the exact place of the occurrence. The condition of the road-bed at the place, or in the immediate vicinity, of the accident, may, we think, be shown. This is also declared in effect in the case of *Hipsely v. Kansas City & St. J. R.*, 88 Mo. 348, where Chief Justice Norton, speaking for the court, further observes that "the fact that the road in other places may not have been in good condition had no tendency to prove it was in a bad condition at the place where the accident in question happened." Tested by these decisions, the testimony of the witness Crowley as to the condition of the track a mile and a half from the place of the accident, and the testimony of other witnesses of like import, must, we think, be held incompetent and inadmissible. But, in view of the instructions given in the cause, this evidence must, we think, be held to have been withdrawn and excluded from the jury. The following, given by the court of its own motion, we think accomplished that purpose:

Ninth. In this case defendant is only liable for injuries suffered by its passengers on its trains if such injuries were caused by its negligence in some one or all of the particulars charged specifically

in the petition; and these particulars are alleged to be, at the place of the accident, when the train arrived there: (1) Defective rails; (2) imperfect fastenings thereof; (3) decayed and imperfect ties upon which said rails rested; (4) sunken condition of the ties and rails; and (5) that the ends of the rails in said track did not meet at the joints properly. No other item or conjecture of negligence can be considered by the jury in this case; and unless the jury find, from the evidence, that the injury occurred in consequence of defects in some one or all of these respects, the jury must find for the defendant.

The evidence in the record, which was competent and admissible, was amply sufficient to authorize the finding, independent of that erroneously received; and the above instruction was, we think, such as should be held to cure and make harmless the error committed in the admission of the evidence referred to.

The third exception taken to the instruction given upon the measure of damages, and which is as follows, is, we think, also untenable: "The court instructs the jury that if they find for the plaintiffs, in estimating the amount of damages, it is their duty to consider the physical condition of Hannah Sidekum before and since receiving the injuries sued for, and the physical pain and mental anguish suffered by her at the time of, and since, said accident, on account of said injuries, and the amount of pain she will likely suffer in the future on account of said injuries, together with all other circumstances shown in evidence; and, considering all the circumstances aforesaid, they will find a verdict for such sum as in their judgment will compensate for said injuries, not exceeding ten thousand dollars." The objection is not to any of the items or elements of damages specified in the instruction, which are conceded to be correct, but that the language which is put in italics authorized the jury, not only to consider the enumerated grounds of compensation, but other matters in addition, such, for example, as the bad condition of the railroad at other places than that of the accident; but, fairly considered, the instruction is not, we think, vulnerable to this or other similar criticism, and the exception taken to said instruction must be overruled.

The fourth, and remaining exception, will now be noticed briefly. This, as already appears, pertains to the closing argument made in behalf of plaintiff. The cases to which we have been referred all recognize the difficulty and delicacy involved in any attempt to confine counsel to a strictly legitimate line of argument; and the restrictions and limitations which may be fairly imposed are, we think, necessarily somewhat indefinable. *Loyd v. Hannibal & St. J. R.*, 53 Mo. 514. As was said in that case, "it is no doubt the duty of the judge who presides at the trial to prevent such departures from the proper and legitimate sphere of

counsel ;” and in criminal cases, some of which have been cited, this court has condemned, in strong terms, departures from the proper practices and usages in this behalf. In civil cases, ordinarily, this court cannot interfere with the discretion of trial courts, unless counsel is permitted, against objections, to make or persevere in such arguments; but where such objection is made, and the exception to such course in argument is duly taken, the same may be good ground for new trial or for reversal. We do not understand the case of *Brown v. Swineford*, 44 Wis. 282, to which we were referred, and in which Justice Ryan considers this question, to go to any greater length. We must necessarily defer, to a large extent, in any case, and especially in civil cases, to the action of the trial courts upon questions of this sort. In the present case there was no objection made or exception saved to the said closing argument of plaintiff's senior counsel at the time, or during its delivery, and no ruling of the trial court then asked in that behalf. In the absence of such timely objection and exception, we must, under our practice, deem the same waived, at least in a civil case; and, where the damages awarded by the verdict do not appear to be excessive, we cannot reverse the judgment upon this ground.

This leads to an affirmance of the judgment, and it is accordingly so ordered.

(All concur.)

Examination of Person by Order of Court.—The court may require a person to submit to an examination, *A., T. & S. etc., v. Thul.*, 10 Am. & Eng. R. R. Cas. 378; *S. C. & P. R. v. Finlayson*, 18 Id. 68; *White v. M. C. R.*, 18 Id. 213; see 27 Am. & Eng. R. R. Cas. 245.

Condition of Track.—Evidence of condition of track at place of accident more than 3 years after it happened not admissible. *Stoher v. St. L., I.M. & S. R. (Mo.)*, 4 S. W. Rep. 889.

Evidence of the condition of a railroad track 2 months after the accident is inadmissible. *L. R. & Ft. S. R. v. Eubanks (Ark.)*, 3 S. W. Rep. 808.

Evidence of repairs done to railroad and of new ties, which does not tend to show that repairs were made at place of accident, incompetent. *Knapp v. S. C. & P. R. (Ia.)*, 82 N. W. Rep. 18. See also 27 Am. & Eng. R. R. Cas. 299, n.

Remarks of Counsel.—See 27 Am. & Eng. R. R. Cas. 328, n.

ROCHAT

v.

NORTH HUDSON COUNTY R. CO.

(*Advance Case, New Jersey. March Term, 1887.*)

In an action to recover damages for personal injuries received by plaintiff while a passenger on a horse-car of the defendant company, it appeared that

the car was full of passengers and plaintiff was standing on the front platform with his back to the front of the car, holding the hand-rail behind him. After the car had stopped to let a passenger alight, the driver whipped up the horses, causing a sudden jerk of the car, whereby plaintiff was thrown from the platform and injured. *Held*:

1. That the fact that the driver whipped up the horses when about to start the car was no evidence of negligence, unless there appears to be something unusual in the manner of whipping them.

2. That as the plaintiff was the only witness who testified to the whipping, and did not intimate that it was severe; that as the sudden jerk was the normal consequences to start the car; and that as the plaintiff's position on the platform was such that a sudden jerk could not cause him to be thrown sideways from the platform, a recovery could not be had.

If the trial court erroneously refuses to non-suit the plaintiff for want of evidence of the defendant's responsibility, and exception is thereupon sealed, and the defect in proof be not subsequently remedied, error may be assigned upon the exception, and the judgment may be reversed.

In error from the supreme court.

J. C. Besson and *H. C. Pitney* for plaintiff in error.

M. T. Newbold and *G. Collins* for defendant in error.

DIXON, J.—On September 1, 1884, John May was injured by a horse-car of the defendant, and subsequently brought suit in the Hudson circuit for the resulting damages. He there recovered judgment, which was afterward affirmed in the supreme court on writ of error, and is now in this court for review.

The principal assignment of error is based upon an exception to the refusal of the circuit to nonsuit the plaintiff at the trial for want of proof of negligence on the part of defendant.

This assignment seems to have been deemed unavailable in the supreme court, because, after the nonsuit was refused, the defendant introduced evidence tending to show how the injury was occasioned, and did not subsequently renew the motion or ask the court to instruct the jury to find for the defendant on this ground.

SEALING EXCEP-
TION — ASSIGN-
MENT OF ERROR.

But this idea is not in accord with the settled doctrine and practice of this court. At least since the *Central R. Co. v. Moore*, 4 Zab. 824, exceptions of this nature have been constantly regarded as properly sealed, and judgments have thereupon been affirmed and reversed. *N. J. R. & T. Co. v. West*, 4 Vr. 430; *N. J. Express Co. v. Nichols*, Id. 434; *D. L. & W. R. Co. v. Toffey*, 9 Id. 525; *Penn. R. Co. v. Richter*, 13 Id. 180; *D. L. & W. R. Co. v. Dailey*, 8 Id. 526.

The objection made to the practice is, that after the exception is allowed the defendant may have supplied the defect in proof complained of, and, although such supplemental evidence ought to prevent the reversal of the judgment, yet it would not theoretically, and, if the defendant insisted on his legal right to have the bill sealed immediately upon the refusal, could not actually be em-

bodied in the bill. But the objection is without substance. The bill is never in practice sealed until all the testimony is put in, and, therefore, the trial court is able to refuse to affix its seal unless all the pertinent evidence is set forth, and the appellate court examine all the testimony before it to see whether the defect is remedied. *Perth Amboy Man. Co. v. Condit*, 1 Zab. 659; *D., L. & W. R. Co. v. Dailey*, 8 Vr. 526. Even if the bill had been sealed at once upon the refusal, the trial court might justly strike that bill from its records, because it did not fully present the grounds on which the question raised ought to be decided. A similar objection might be urged against the reversal of a judgment for the improper admission of a document insufficiently proved, since due proof might afterward in the trial have been produced; but such reversals do take place when the proper proof is not added, and when it is, the error is disregarded. Practically no difficulty results from these rules in the administration of the law. The powers of the courts are ample to insure their uses for the furtherance of justice only. The assignment of error on this exception should, therefore, be considered.

The testimony most favorable to the plaintiff tends to prove that on September 1, 1884, toward evening, John May stood smoking on the right side of the front platform of a horse-car belonging to
FACTS. the defendant; he was directly behind the brake, facing it, with his back against the front of the car, and holding the hand-rail behind him with his left hand; he was about thirty five years of age, in good health, and accustomed to ride on the platform of cars, and had taken the position above described when he boarded the car, a few moments before the accident; the car was full of passengers, five or six of them being on the front platform, and was drawn by two horses; the track was straight and the grade about level; under these circumstances the driver stopped or almost stopped the car for a lady to alight, and when she was off he whipped up his horses, and although Mr. May saw that done, yet not being prepared for it, as he says, the sudden jerk threw him off the platform and he was injured. The question is, whether this testimony indicates, directly or inferentially, any negligence on the part of the company's driver.

Certainly it is not improper to whip up a pair of horses when they are required to start a car loaded with people, unless there is something extraordinary about either the horses or the
NO EVIDENCE OF NEGLIGENCE. whipping. Nothing extraordinary is asserted by the witnesses; but it is claimed that something of the kind may be inferred from the other statements that the car gave a sudden jerk and Mr. May was thrown off.

There are several considerations which render such an inference unreasonable, if not impossible. First, Mr. May, the only witness who testified to the whipping, did not intimate that it was severe

and no witness spoke of anything unusual in the behavior of the horses. This, under the circumstances, is tantamount to affirmative evidence that both were ordinary. Secondly, some sudden jerk was only a normal consequence of the effort of two horses to start a car, full of passengers, to which the horses were attached by loose traces, and in this case it cannot be presumed that the jerk was attended by a great and instantaneous increase of speed, because the strength of the horses would not be able to impart that to such a load. As Mr. May saw that the start was about to be made, he should have been prepared for the jerk which it would necessarily occasion. Thirdly, the statement that Mr. May was thrown off seems unfitted to afford any indication of the character of the driver's act; for it is not conceivable how whipping the horses could cause such a movement as would throw Mr. May off the car from the position in which he stood. Every movement so induced must have been accompanied by only a moderate increase of speed, and must also have been in a straight line forward, and its effect on Mr. May could only be to incline him backward against the point of the car where he was already leaning, steadying himself with his left hand upon the rail. Such a movement would have no tendency either to loosen his grasp or to hurl him sideways off the platform. If, therefore, while standing in the position which he describes, he was thrown with the violence in the direction to which he testifies, there must have been some other cause than the sudden jerk of the car which the whipping of the horses occasioned.

Hence, when we seek in the evidence for some ground on which to base a rational inference that the driver's manner of whipping the horses evinced a want of due regard to the safety of the passengers, we are unable to find it, and so are left to the bare fact of the whipping to support the charge of negligence.

That fact alone affords no evidence of negligence in this case.

The nonsuit, when asked for, should have been granted.

No proof of the defendant's negligence was afterward supplied. On the contrary, the testimony subsequently adduced made it quite clear that the accident was caused by circumstances which the defendant's agents had no opportunity to control.

The judgment should be reversed.

Nonsuit.—Where no fair inference of negligence can be drawn from evidence favorable to the plaintiff, upon the assumption that it is true, the issue should be withdrawn from the jury. *Hathaway v. E. Tenn. R.*, 29 Fed. Rep. 489.

Where, in an action to recover for injuries sustained from the sudden movement of a horse-car, it appeared that plaintiff had been drinking, was riding on the front platform, although without objection, and stepped to the lower step to permit persons to pass, and that the sudden movement was not unusual and should not have been unexpected, *held*, that a nonsuit should have been granted. *Hayes v. 42d St., etc., R.*, 97 N. Y. 259.

Where there is evidence upon which jury might find for plaintiff, it should not enter a nonsuit. *Walton v. Ackerman* (N. S.), 10 A. Rep. 709.

As to when the court must grant a nonsuit in actions for personal injuries, see 26 Am. & Eng. R. R. Cas. 399.

Jolting of Car.—A railroad company is not liable to a passenger who is jolted off by an ordinary movement of the car. *F. S., etc., R. v. Hayes*, 21 Am. & Eng. R. R. Cas. 358.

See *Dougherty v. M. R.*, Am. & Eng. R. R. Cas.

Riding on Platforms of Street Cars.—It is not negligence to ride on platform of a street-car. *Nolan v. B. C., etc., R.*, 8 Am. & Eng. R. R. Cas. 463; *Fleck v. R. Co.*, 16 Id. 372; see 21 Am. & Eng. R. R. Cas. 860.

HOLLAND

v.

LYNN AND BOSTON R. CO.

(*Advance Case, Massachusetts. May 9, 1887.*)

Prior to the Massachusetts statute of 1886, chapter 140, a street-railway company was not liable to an action of tort for negligently causing the death of a person, whether a passenger or not, upon its road.

ACTION of tort by the administrator of the estate of Julia Holland against a street-railway company, to recover damages for injuries received by the plaintiff's intestate while a passenger on defendant road on or about August 31, 1885, by the negligence of defendant, from which injuries she subsequently died. The action was brought for the use and benefit of the next of kin of said Julia Holland. The writ was dated December 16, 1885. The defendant demurred to the plaintiff's declaration upon the ground, among others, that no action lies in behalf of the plaintiff against the defendant to recover damages for the death of said Julia Holland. The superior court sustained the demurrer and plaintiff appealed. The case is stated in the opinion.

C. T. Gallagher for plaintiff.

T. P. Proctor and *E. Tappan* for defendant.

MORTON, Ch. J.—The question presented in this case is, whether, prior to the statute of 1886, chapter 140, a street-railway company was liable to an action of tort, if, by reason of its negligence, the life of a passenger was lost. That statute was passed after the injury complained of in this case, and, therefore, has no application to the case. *Kelley v. Boston & Maine R.*, 135 Mass. 448.

The public statutes provide that "if by reason of the negligence or carelessness of a corporation operating a railroad or street railway, or of the unfitness or gross negligence or carelessness of its servants or agents, while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence, and not a passenger, or in the employment of such corporation, is lost, the corporation shall be punished by fine of not less than \$500 nor more than \$5000, to be recovered by indictment prosecuted within one year from the time of the injury causing the death, and paid to the executor or administrator for the use of the widow and children of the deceased." Pub. Stats., chap. 112, § 212. Under this provision a street-railway company is liable to an indictment if a life is lost by reason of its negligence or the gross negligence of its servants.

LIABILITIES OF
RAILWAYS UN-
DER MASSACHU-
SETTS STATUTES.

The same section further provides that "if the corporation is a railroad corporation it shall also be liable in damages, not exceeding \$5000 nor less than \$500, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and to be recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person for the use of the persons hereinbefore specified in the case of an indictment."

It is clear that this provision does not apply to street-railway companies.

The first section of the chapter provides that in the construction of this, and the following chapter, "the phrase 'street railway' shall mean a railroad or railway usually operated by animal power; 'railroad corporation' and 'railroad company,' shall mean the corporation which lays out, constructs, maintains or operates a railroad operated by steam power; 'street-railway company' shall mean a corporation by which a street railway is constructed, maintained, or operated."

It is to be observed that the following chapter, which is the chapter concerning street-railway companies, makes no provision for an action of tort against such company, if a life is lost by reason of its negligence or the gross negligence of its servants.

The plaintiff contends that street-railway companies are liable to an action of tort under section 6 of chapter 73 of the Public Statutes. This provides that "if the life of a passenger is lost by reason of the negligence or carelessness of the proprietor or proprietors of a steamboat or stage coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants, or agents, such proprietor or proprietors and common carriers shall be liable in damages not exceeding \$5000 nor less than \$500, to be assessed with reference to the degree of culpability of the proprietor or proprietors or common carriers liable, or of their servants or agents, and recovered in an action of tort

commenced within one year from the injury causing the death, by the executor or administrator of the deceased person for the use of the widow and children of the deceased." This is a re-enactment, in substantially the same words, of the statute of 1881, chapter 199, which was the first statute to give an action of tort for the loss of life against any common carriers of passengers. It is true that the phrase "common carriers of passengers" is broad enough to include street-railway companies; but when we consider the history and course of legislation upon this subject, we are brought to the conclusion that this enactment was not intended to include and apply to such companies.

Railroad and other carriers of passengers were first made liable for damages for the loss of life caused by their negligence, by the statute of 1840, chapter 80, which provides that "if the life of any person, being a passenger, shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, steamboat, stage coach or of common carriers of passengers," such proprietors or common carriers shall be liable to a fine, to be recovered by indictment for the use of the widow and children of the deceased. Under this statute, clearly railroads were liable to an indictment which could be brought at any time within six years after the injury causing the death. *Commonwealth v. Boston & Worcester R. Co.*, 11 Cush. 512.

By the statute of 1853, chapter 414, railroad corporations were made liable to indictment for the loss of life of persons not passengers, and it was provided that all indictments against any railroad corporation for loss of life shall be prosecuted within one year from the injury causing the death. These provisions were re-enacted in the General Statutes, as to railroad corporations, in chapter 63, sections 97 and 98, and as to other carriers, in chapter 160, section 34, which significantly omits "railroad" from the enumeration of carriers liable under it.

Under the General Statutes, it was held, that while indictments against railroad corporations must be brought within one year, indictments against other carriers, to whom the statute applied, might be brought at any time within six years. *Commonwealth v. East Boston Ferry Co.*, 13 Allen, 589. It is thus seen that after the passage of the general act as to the liability of carriers in 1840, the legislature enacted special statutes applicable to railroad corporations, which were inconsistent with the general act. The legislature could not have intended that railroad corporations should be liable under two inconsistent statutes covering the same subject.

The effect, therefore, of the latter special legislation was to repeal so much of the statute of 1840 as applied to railroad corporations, or, in other words, to take railroad corporations out of the

operation of the earlier statute. The same reasoning applies in the case of street-railway companies.

By the statute of 1864, street-railway companies were made liable to indictment for the loss of life of a passenger or of a person not a passenger, and it was provided that the indictment, as in the case of steam-railroad company, must be brought within one year of the injury. Stat. 1864, chap. 224, §§ 37, 38. These provisions were re-enacted in the statute of 1871, chapter 381, sections 48–50. These provisions were inconsistent with the statute of 1840, and the effect was to take street-railway companies out of the operation of that statute. The statute of 1874, chapter 372, has no bearing upon the case, as it does not repeal the statute of 1871, above cited, section 163, as to the liability for loss of life being applicable only to railroad corporations operated by steam power, and, as to them, being a re-enactment of laws previously in force.

We come now to the statute of 1881, chapter 199, which first gave an action of tort against carriers of passengers for the loss of life. It is clear that the first section does not apply to street-railway companies. But it is useless to discuss this, because the statute was repealed in a few months by the same legislature which enacted it, and the provisions of the first section were embodied in the Public Statutes, chapter 112, section 212, in a form which, as we have seen in the first part of this opinion, includes only steam railroad corporations.

The third section, re-enacted in the Public Statutes, chapter 73, section 6, in its description of the parties who are subject to the statute, follows exactly the words of the General Statutes, chapter 160, section 34, and gives against such parties a new remedy. It was not intended to enlarge the scope of that provision of the General Statutes by making different persons or corporations subject to liability, but to give an additional remedy against the same persons. Being in the same words as the previous statute, it should receive the same construction unless a different intention is clearly shown. As we have seen, street-railway companies, as well as steam-railroad corporations, were not within the previous statute. Each had special provisions as to liability for loss of life, and if the legislature had intended to include them, or either of them, in the third section of the statute, it would have been natural to specify them in the statute. One construction is, in some degree, confirmed by the passage of the statute of 1886, making street-railway companies liable in actions of tort, a statute which was unnecessary if they were already so liable.

For these reasons we are of opinion that prior to the statute of 1886, a street-railway company was not liable to an action of tort for the loss of the life of a person, whether a passenger or not a passenger.

Judgment affirmed.

GUNN

v.

CAMBRIDGE R. Co.

(Advance Case, Massachusetts. May 9, 1887.)

Prior to the Massachusetts statute of 1886, ch. 140, a street-railway company was not liable to an action of tort for negligently causing the death of a person, whether a passenger or not, upon its road.

Holland v. Lynn, etc., R. Co., supra, followed.

ACTION of tort by the administrator of the estate of Frank H. Gunn, to recover for the loss of the testator's life, on October 11, 1885, by the negligence of the defendant, and the gross negligence of its servants and agents. The writ was dated October 11, 1885. The plaintiff's declaration contained six counts. The first and second count alleges that the intestate was a passenger, and defendant a railroad, operating a street railway in Cambridge; the third and fourth counts that the plaintiff's intestate was in the exercise of due care, but was not a passenger, or in the employment of defendant, and that the defendant was a railroad corporation, operating a street railway in Cambridge; the fifth and sixth counts that the plaintiff's intestate was a passenger, and the defendant was a common carrier of passengers. The answer of the defendant was a general denial. At the trial in the superior court, at the close of the evidence, the defendant requested the court to rule that there was no statute under which the third and fourth counts could be sustained, and that upon the offer of proof the plaintiff's intestate ceased to be a passenger before the accident, and that, therefore, the first, second, fifth, and sixth counts could not be sustained. The court ruled as requested, and ordered the jury to return a verdict for the defendant on all the counts. The plaintiff alleged exception.

S. J. Elder and *J. S. Wheeler* for plaintiff.

S. Hoar and *W. H. Martin* for defendant.

MORTON, Ch. J.—This case is decided by *Holland v. Lynn & Boston R. Co., ante*. Whether the plaintiff's intestate was a passenger or not, at the time of his injury, the defendant being a street-railway company, is not liable in an action of tort.

Exceptions overruled.

LANGFORD

v.

BOSTON AND ALBANY R. Co.

(*Advance Case, Massachusetts. May 9, 1887.*)

Where a *nolle prosequi* is entered by the procurement of the party prosecuted, or by his consent, or by way of compromise, such party cannot maintain an action for malicious prosecution. Hence, where, by procurement of defendant's attorney, the district-attorney entered a *nolle prosequi* on defendant's appeal to the superior court, an action for malicious prosecution could not be maintained.

The mere entry of a complaint before a trial justice, and the issue thereon of a warrant of arrest, will not render the complaining party or his principal liable in trespass for the acts of the officer in serving the warrant.

An act done by legal authority does not constitute an assault.

On plaintiff's exceptions. Overruled.

Action of tort against the Boston & Albany R. Co: the declaration being in two counts, one for malicious prosecution, and the other for false imprisonment.

The prosecution complained of was a complaint before a trial justice for Norfolk county, made by one Sargent, a conductor of the defendant, that the plaintiff, at a certain date and place in said Norfolk, "did then and there, being in the cars of the Boston & Albany R., unlawfully refuse to pay or give an equivalent for his fare from Natick to Wellesley;" on which complaint a warrant was issued, defendant arrested and brought before the trial justice, tried, convicted, fined, and recognized upon his appeal to the superior court, where the district attorney entered a *nolle prosequi* of the complaint upon the record, in the following form:

"I will no further prosecute this complaint.

"EVERETT C. BUMPUS, Dist. Atty."

The foregoing facts constituted the imprisonment complained of in the second count. The record of said proceedings was in evidence.

At the trial in the superior court before Thompson, J., the plaintiff introduced evidence tending to show that on the day referred to he purchased a ticket from Natick to Newton on the Boston & Albany R., paying twenty-five cents therefor; that the

ticket so purchased was apparently an unlimited and unrestricted ticket, and was in the following form :

BOSTON & ALBANY RAILROAD.		
$\frac{1}{8}$	NATICK	$\frac{1}{8}$
	TO	
	NEWTON.	
G. N. GRIGGS, G. T. A.		
		1881 A

The plaintiff purchased it, intending to stop over on said ticket at Wellesley station, which is between Natick and Newton, and supposing that he had a right to stop over on it, but did not communicate his purpose to the station-master, from whom he purchased the ticket. Upon the train he presented the ticket and asked for a stop-over check at Wellesley. The conductor took the ticket into his possession, and returned it again to the plaintiff, and refused to give him a stop-over, and demanded that he should pay a cash fare from Natick to Wellesley, or give up the whole ticket to Newton. The plaintiff tendered said ticket to the conductor to be punched, which the conductor refused to do, stating that that would destroy its value upon the next train. The plaintiff said he would take his chances on that. The plaintiff said to the conductor that he had purchased the ticket supposing he had a right to stop over on it. Plaintiff refused to pay a cash fare for the distance ridden, and refused to surrender his ticket except upon the terms aforesaid. The conductor said to the plaintiff that he was a new conductor, and had never had a case of the kind before, and did not know but the plaintiff was right. If plaintiff would give him his name and address (which plaintiff did), he would refer the case to the officers of the railroad, and if plaintiff was in error, they would notify the plaintiff of the error, and he could come in there and make good the deficiency. If plaintiff was in error, plaintiff said he would pay what he owed the road. Plaintiff claimed he made a "contract" by this conversation with the conductor to refer it to the officers of the road.

Plaintiff got off from the train at Wellesley without having paid any cash fare or ticket, and later in the same day continued his journey from Wellesley to Newton, then surrendering said ticket, in the condition in which he had bought it, to the conductor on the later train.

The former conductor told the plaintiff that it was against the rules to issue a stop-over check, but did not show the rules. Said conductor was named Sargent, and was the same person who made the complaint to the trial justice. He was requested to show the printed rules, both at said conversation on the cars and before the trial justice, but did not have them.

The next thing the plaintiff heard of the matter, after said occurrences on the cars, he received a letter requesting his appearance, from the officer who served the warrant, and thereupon, October 17, wrote a letter to the general manager of the railroad company, and stated his view of the facts, to which he received a reply dated October 19, received the day after his conviction before the trial justice. The letter from the plaintiff to the general manager was received by him and referred to the general traffic manager to take such action as he saw fit.

Said general traffic manager of the railroad testified that this matter was referred to him; that such reports came under his general charge; that he gave conductor Sargent instructions to go to the justice and state the facts to him, and ask the justice to take action in the way of bringing this Mr. Langford to a prosecution.

In the printed book of the regulations of the road, giving directions to the conductors as to their duties in regard to stop-over checks, was the regulation. "No stop-overs will be issued on tickets sold at rates less than fifty cents;" and it was the duty of the conductor to refuse to give such stop-over; and he had no authority to punch said ticket and leave it in possession of plaintiff.

The plaintiff testified that, after his conviction by the trial justice upon said complaint, he employed Gerge W. Morse, Esq., as his attorney, to attend on his behalf to any further proceedings in the said complaint upon appeal in the superior court; that he himself never personally appeared in said superior court; but that he learned from his said attorney that said George W. Morse acting as attorney for the plaintiff, got the district attorney to enter said *nolle prosequi*.

The court ruled that the facts as proved by the plaintiff did not entitle him to recover in this action, and instructed the jury to return a verdict for the defendant, to which ruling the plaintiff excepted.

Morse & Lane and *William Webster* for plaintiff.

Samuel Hoar for defendant.

MORTON, Ch. J., delivered the opinion of the court:

The first count of the plaintiff's declaration is in substance, a count for malicious prosecution; and it cannot be maintained, because the evidence fails to show such a determination of the prosecution alleged to be malicious as will entitle the plaintiff to maintain this action. The entry of *nolle prosequi* by the district attorney, of his own motion, followed by a discharge of the accused party by the court, may be such a termination of the prosecution as will enable the party to maintain an action for malicious prosecution. *Graves v. Dawson*, 133 Mass. 419.

But our cases uniformly hold that where a *nolle prosequi* is entered by the procurement of the party prosecuted, or by his con-

NOL. PROS. ENTERED BY CONSENT OF DEFENDANT.

sent, or by way of compromise, such party cannot have an action for malicious prosecution. *Parker v. Farley*, 10 Cush. 279; *Coupal v. Ward*, 106 Mass. 289; *Graves v. Dawson*, 130 Mass. 78.

In the case at bar, after the complaint against the plaintiff was entered in the superior court upon his appeal, a *nolle prosequi* was entered by the district attorney, by the procurement of the attorney of the plaintiff. No discharge was ordered by the court. The superior court rightly ruled that the plaintiff could not maintain his count for malicious prosecution.

The second count is for assault and false imprisonment. One of the agents of the defendant made a complaint to a trial justice against the plaintiff for unlawfully refusing to pay his fare; and the magistrate thereupon issued his warrant in due form for the arrest of the plaintiff. Neither the defendant nor any of its agents did anything except to enter the complaint. It is well settled that where a person does no more than this, he is not liable in trespass for the acts done by the officer in serving the warrant, even though the magistrate has no jurisdiction to issue the warrant. *Barker v. Stetson*, 7 Gray, 53.

In the case before us, the magistrate had jurisdiction of the subject-matter and of the parties. Although the complaint was defective, the warrant was good on its face, and an arrest under it was an act done by virtue of legal authority, and does not constitute an assault. *Coupal v. Ward*, *ubi supra*.

Exceptions overruled.

Malicious Prosecution.—In an action for malicious prosecution by a passenger whose arrest was caused by a conductor for not paying his fare evidence tended to show that the plaintiff, on a trip from A. to B. offered a "ticket from A. to B. and return," which he had already used for a trip from A. to B., and which conductor refused to accept. Plaintiff thereupon refused to pay, but saying that he had no money because he supposed the ticket good, promised to pay when they should arrive at B., and offered his ticket as security, which was refused. Upon arriving at B. the conductor caused his arrest before leaving the car for fraudulently evading payment of fare by leaving the car without such payment, and upon trial plaintiff was acquitted. *Held*, that there was sufficient evidence of want of probable cause to support verdict for plaintiff. *Krulevitz v. East. Ry. (Mass.)*, 26 Am. & Eng. R. R. 118. See *Lowe v. Wartman (N. J.)* 8 East. Rep. 780-781 n.; *Hatch v. Cohen*, 84 N. C. 602. As to liability of corporations for malicious prosecution see 26 Am. & Eng. R. R. Cas. 134, n.

Nol. pros.—If a *nol. pros.* is entered for reasons other than an irregularity or informality in the indictment—as for instance because it is believed that the prosecution cannot be sustained—after the expiration of the term an action for malicious prosecution is not maturely brought. *Woodworth v. Miles*, 61 Wis. 44.

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NOTE.—The mode of citing the American and English Railroad Cases is as follows:

80 Am. & Eng. R. R. Cas.

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Certain portions of the court's charge urging a jury to an agreement and not properly excepted to by counsel will not be considered on appeal. The mere statement by the judge of these facts in the record, although written by him and signed officially, cannot be received as its substitute. *Owens v. Missouri Pacific R. Co.* 205.

What is a final decree from which an appeal can be taken. *Porter v. Pittsburg, etc., Co.* 473.

Where a desired qualification to a general charge was not brought to the attention of the court at the time, exception based thereon will not be considered. *Simms v. South Carolina, etc., R. Co.* 571.

To set aside a verdict as contrary to the law and the evidence, plaintiff in error must show that, having waived all his own evidence merely oral and given full force to his adversary's, the verdict is still erroneous. *Norfolk & W. R. Co. v. Prinnell.* 574.

APPURTENANCES.

See EMINENT DOMAIN.

ARREST.

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ARTICLES OF INCORPORATION.

See CHARTER; EVIDENCE.

ASSAULT.

The mere entry of a complaint before a trial justice, and the issue thereon of a warrant of arrest, will not render the complaining party or his principal liable in trespass for the acts of the officer in serving the warrant, nor does an act done by legal authority constitute an assault. *Langford v. Boston & Albany R. Co.* 658.

ASSIGNMENT.

See INJUNCTION.

An assignee of the claim for labor is entitled to all the benefits of the statute, but an order of the sub-director on a merchant is not an assignment of the laborer's claim, nor do bills for keep of teams or board of men employed on the road come within the act. *Dudley v. Toledo, Ann Arbor & Michigan R. Co.* 286.

Under the railroad act of Michigan a certificate signed by one of the board as chairman, and by a person employed as secretary, in which they are described as a board of railroad consolidation, is not authorized; nor does it prove proceedings of a meeting of stockholders authorizing a consolidation of railroads recited therein, but which is not shown to come from any record, and is contradicted by the testimony of persons recited as being there when they were not there. *Held*, also, there being no valid consolidation of two railroads, an assignee of the alleged consolidated company cannot sue on the contract with one of the railroads. *Brown v. Dibble.* 241.

Where a land-owner brought suit to recover compensation for land taken against a railroad which had an assignment of a contract by which

ASSIGNMENT—Continued.

the owner agreed to convey the strip of land to another company, but previous to this assignment first company had entered upon the ground and commenced construction, it was *held*, that having entered and built without reference to the agreement and independently thereof, it not having been assigned until after commencement of the road, the company were not entitled to conveyance, having already appropriated the land under the power of eminent domain, and the owner was not estopped from claiming the compensation, his right to which occurred upon the entering of the company. *Oregon, etc., R. Co. v. Day.* 838.

ASSUMPSIT.

In Illinois, under an unverified plea of the general issue in assumpsit against a common carrier for goods lost, the defendant may at his trial deny his liability under a bill of lading; par. 34 of the Practice Act having no application to such a denial. *St. Louis, etc., R. Co. v. Knight.* 88.

BENEFICIAL USE.

See DAMAGES.

BILL IN EQUITY.

See EQUITY.

BILL OF EXCEPTIONS.

Where the record shows that a cross-bill of exceptions is signed on the same or nearly the same date as the principal bill, it is in time though not sued out until more than sixty days after the trial. *Harris v. Central R. Co.* 581.

BILL OF LADING.

See CARRIER; DELIVERY.

Consignor made oral contract with carrier that cars should be furnished for shipping live stock on a day certain, and carrier knew shipper's intention that they should arrive at destination in time for a particular market. Cars were not furnished. Two days later cattle were forwarded, and consignor signed a bill of lading limiting carrier's liability. In an action by consignor for the special damages resulting, *held*, the parol undertaking was not merged in the bill of lading. *Held, further*, a charge to the jury that if the day of intended arrival was a sale day, and the best sale day, chosen by the shipper and known to the carrier, and in contemplation of the parties when contracting, the consignor could recover the special damages actually resulting, was correct. *Hamilton v. Western North Carolina R. Co.* 1.

In action against a carrier for damages to live stock it is no defence that a defective car belonged to a connecting carrier, nor is the latter protected by a provision in the contract that the shipper accepted the car provided. *Wallingford v. Columbia, etc., R. Co.* 40.

A bill of lading as follows: Received "the following packages, contents unknown, . . . marked and numbered as per margin," is not a warranty by the carrier that the goods are of the quality described in the margin. *St. Louis, etc., R. Co. v. Knight.* 88.

BILL OF LADING—Continued.

A, at different times, and at different points south of Texarkana, shipped quantities of cotton to be made into bales at a compress-house, thence to be forwarded to destinations. Work at the compress-house was done by the carrier under shipper's directions, and shipper there controlled cotton and selected particular bales for shipment. Bills of lading were issued by carrier sometimes in advance of the separation, and A drew against shipments with bills of lading attached and had his drafts discounted; draft sometimes matured before arrival of cotton. A consignment to B described in the bill of lading as "contents unknown," "marked and numbered as per margin," on arrival did not correspond with mark on margin. B, who had honored the draft before cotton arrived, refused to accept consignment and sued the carrier in assumpsit. *Held*, that if the carrier was liable as warehouseman, liability could not be enforced under this declaration, nor by consignee. *St. Louis, etc., R. Co. v. Knight.* 88.

Under same circumstances, *held*, that the carrier was not liable as a common carrier from points south of Texarkana for the specific bales consigned to B; that its liability as common carrier began only when specific lots were marked and designated at that point and specifically set apart to correspond with a bill of lading then or previously issued. *St. Louis, etc., R. Co. v. Knight.* 88.

Where goods were shipped under a special contract and there is no conclusive evidence that the consignor accepted bills of lading in place of such contract, the latter fixes carrier's liability and cannot be abrogated or altered by carrier's subsequently signing and mailing bills of lading which did not reach consignor (who was also consignee) until after loss occurred. *Swift v. Pacific Mail Co.* 105.

BILLS AND NOTES.

See STOCK; SUBSCRIPTION.

One indorser with others of a note secured by pledge is subrogated to all rights of pledgee by payment of the note. *Woodward v. American, etc., R. Co.* 256.

BLASTING.

See DAMAGES.

BONA FIDE PURCHASER.

See MORTGAGE.

BONDS.

See MORTGAGE; MUNICIPAL AID BONDS.

A railroad company hypothecated certain county bonds, part of the subscription to its construction by the county, for which the company executed a trust deed securing its bond for the amount of the subscription, on condition that it should pay the interest on the bonds till the construction of the road into the county, and indemnify the county against the principal of the bonds unless the road should be constructed by a time agreed. Other incumbrances were afterwards placed on the road by the company and its successors. A sale subjecting the road to the claims of its creditors was subsequently had

BONDS—Continued.

subject to the lien of the county, and part of the proceeds applied to the redemption of the hypothecated bonds. *Held*, that the bonds having been redeemed by the money held in trust for the benefit of creditors of the first corporation, a new corporation could only receive them by paying back into the trust fund the amount by which it had been depleted for their benefit. *Washington, etc., R. Co. v. Lewis.* 468.

Unsecured floating debts due by a railroad company for construction in the absence of statutory provision are not a lien on the railroad superior to the lien of a valid mortgage on it duly recorded and of bonds secured thereby, and held by *bona fide* purchasers for value. *Porter v. Pittsburgh, etc., Co.* 472.

BRAKES.

See NEGLIGENCE.

BRIDGES.

See DAMAGES.

BUILDINGS.

See DAMAGES.

BURDEN OF PROOF.

See EVIDENCE.

When plaintiff, in such action, has proved shipment and injury, he makes out a *prima facie* case, and burden of proof is on carrier to show that by lawful contract or common law he was not liable for the damage as it occurred. *Wallingford v. Columbia, etc., R. Co.* 40.

A car loaded with giant powder was placed upon a side track to await orders, and took fire and exploded, injuring plaintiff's property. There was no evidence of negligence by the railroad, and the jury had only the above facts before them. *Held*, that the burden was on the plaintiff to show that the car was stored in an improper place, and that there was no evidence of this to go to the jury. *Walker v. Chicago, etc., R. Co.* 173.

CALLING NAMES OF STATIONS.

See PASSENGERS.

CANALS.

See WATERS AND WATERCOURSES.

A railroad which received a conveyance from the board of trustees of the Wabash & Erie Canal of a portion of the land occupied and used under the series of laws which provided for the construction of that canal, in terms purporting to convey such lands in fee simple, acquired thereby such an estate therein. *Frank v. Evansville, etc., R. Co.* 224.

CARRIERS.

See CARRIERS OF LIVE STOCK; PASSENGERS.

In Pennsylvania a common carrier may by a special contract limit his liability for loss or injury to goods carried by him as to every cause of injury except that arising from negligence. *Grogan v. Adams Exp. Co.* 9.

Where goods are lost or injured while in the custody of an express company, in the absence of explanation rebutting it, a presumption of negligence arises, and the carrier is liable for the actual value of the goods. *Adams Exp. Co. v. Holmes.* 14.

In such action where failure to deliver goods is not explained by carrier, it may be inferred that they are in carrier's hands and withheld. *Adams Exp. Co. v. Holmes.* 14.

Consignor having arrangements for reduced rates of freight by a certain route, shipped goods to be carried by that route and informed carrier's agents of this fact. The carrier took them by as short or a shorter route on which freight would have been less than by specified route but for consignor's special rates. *Held*, that carrier was liable for wilful breach of his valid contract, but only in nominal damages. *Langdon v. Robertson.* 23.

Purchaser from the consignor by the acceptance of goods acquires a right of property in them, and may maintain an action against the carrier. *Langdon v. Robertson.* 23.

In such case contract for reduced rates will not be assumed to be illegal as contrary to public policy because lower than ordinary rates; and even though not capable of enforcement against carrier, it is no defence for him. *Langdon v. Robertson.* 23.

Carrier undertook to deliver cotton for shipment by steamer to Shippers' Compress Co. by a certain time. Its agent had timely notice of the effect of the delay which subsequently occurred. The Compress Co. was obliged to pay demurrage, and in its suit against the carrier to recover it was *held* that subsequent acceptance of the cotton was not a waiver of stipulation as to time, and that the carrier's contract was not *ultra vires*. *Norfolk & Western R. Co. v. Shippers' Compress Co.* 57.

Provisions of Georgia Code as to failure of carrier to deliver goods to a connecting carrier and penalty therefor, and as to discrimination in rates of freight by one carrier against another, construed. An order of a railroad relating to certain kinds of merchandise, shipped in competition to a certain point on its road, and discriminating as to rates, construed. *Held*, that a shipper compelled to sell merchandise at a loss because of such order could be permitted to testify to that effect, and that under the provisions of the Code above mentioned all the elements of actual damage which are admissible in other actions may be shown. *Central R., etc., Co. v. Logan.* 63.

Under the circumstances of this case there was no necessity to make the lessor of the road a party defendant to the action; and there was no error in refusing to dismiss the case because service was not perfected on the lessor company. That there was no error in charging that if the railroad company had not complied with the law in one section of the Code it was liable to the penalty imposed by another section, and that the tender of the cars made to the refusing company was sufficient. *Central R., etc., Co. v. Logan.* 63.

Arkansas statute provided that railroad company should not charge greater sum for freight than that specified in bill of lading, and that railroad should be liable in damages for refusal to deliver goods upon payment of such charges. *Held*, that the act, being general and uniform in its

CARRIERS—Continued.

operation upon all persons coming within the class to which it applied, was not unconstitutional as special legislation. *Held, further*, that such act was a police regulation for preventing delay in the delivery of freight, and did not affect interstate commerce. *Little Rock, etc., R. Co. v. Hanniford.* 67.

Where the weight of goods is not specified in bill of lading carrier must weigh within reasonable time and fix charges according to rate specified in the bill of lading. For failure to do so and refusal to deliver it is liable to penalty for delay imposed by statute. *Little Rock, etc., R. Co. v. Hanniford.* 67.

Transportation of property from one State to another is interstate commerce, whether the carriers engaged in moving it, or the vehicle on which it is borne, cross the line of the State or not. *Ex parte Koehler, Receiver, etc.* 71.

The Interstate Commerce Act applies only to carriers using a railway, or a railway and water craft, "under common control, management, or arrangement for a continuous carriage or shipment" of property from one State to another; it does not apply to the carrying of property by rail wholly within the State, although shipped from or destined to a place without the State, so that such place is not a foreign country. *Ex parte Koehler, Receiver, etc.* 71.

The Oregon Railway and Navigation Co. carries by steamer at reduced rates. The Oregon & California R. under management of a receiver carries same goods at reduced rates. The Oregon Pacific R. Co. carries same goods between certain points on the line of the Oregon & California road by railway and steamer at reduced rates and thereby competes with above-named carriers in transportation to San Francisco. The Oregon Railway and Navigation Co. and the receiver of the Oregon & California R. act independently, though concurrently, in making these reduced rates, but through bills of lading are not given, nor is either interested in or liable for the carriage of the goods beyond its own line. *Held*, that the Oregon & California road and steamers of the Oregon Railway and Navigation Co. are not used under common control and do not otherwise come within provisions of the Interstate Commerce Act. *Ex parte Koehler, Receiver, etc.* 71.

Where two rival lines of steamboats bore the same relation to a railroad, each seeking its service to carry freight to same points, and the railroad charged higher rate to one than to the other, *held*, that the damages might be recovered for the discrimination, and that the fact that the rate charged plaintiff was not unreasonable does not affect the question. *Samuels v. Louisville, etc., R. Co.* 79.

Section 90 of the Railways Clauses Consolidation Act, 1845, providing that railway companies' rates shall be equal to all persons as to goods of the same description on the same portion of road under same circumstances, and that no reductions or advances shall be made in favor of or against particular persons, does not prevent the company from making a special charge for goods carried over their railway in pursuance of a traffic agreement with another company under section 87 of the act. *Hull, etc., Dock Co. v. Yorkshire, etc., Iron Co.* 84.

A bill of lading as follows: Received "the following packages, contents unknown, . . . marked and numbered as per margin," is not a warranty by the carrier that the goods are of the quality described in the margin. *St. Louis, etc., R. Co. v. Knight.* 88.

A, at different times, and at different points south of Texarkana, shipped quantities of cotton to be made into bales at a compress-house, thence to

CARRIERS—Continued.

be forwarded to destinations. Work at the compress-house was done by the carrier under shipper's directions, and shipper there controlled cotton and selected particular bales for shipment. Bills of lading were issued by carrier sometimes in advance of the separation, and A drew against shipments with bills of lading attached and had his drafts discounted; draft sometimes matured before arrival of cotton. A consignment to B described in the bill of lading as "contents unknown," "marked and numbered as per margin," on arrival did not correspond with marks on margin. B, who had honored the draft before cotton arrived, refused to accept consignment and sued the carrier in *assumpsit*. *Held*, that if the carrier was liable as warehouseman, liability could not be enforced under this declaration, nor by consignee. *St. Louis, etc., R. Co. v. Knight*. 88.

Under same circumstances, *held*, that the carrier was not liable as a common carrier from points south of Texarkana for the specific bales consigned to B; that its liability as common carrier began only when specific lots were marked and designated at that point and specifically set apart to correspond with a bill of lading then or previously issued. *St. Louis, etc., R. Co. v. Knight*. 88.

A, on receiving an order from B, doing business at Pueblo, Col., shipped consignment to himself at that place and received two receipts from the carrier; one of these he indorsed to B, attached it to a draft and sent it to Pueblo for collection; the other was sent to B without indorsement. B presented this last receipt to the carrier and obtained the goods; the carrier had no knowledge of the receipt and draft; B refused to pay for the goods, and was insolvent. In an action against the carrier for the value of the goods, *held*, that the possession by B of the receipt clothed him with such an apparent right to the goods as relieved the carrier of liability. *Weyland v. Atchison, etc., R. Co.* 102.

In an action against the carrier to recover damages for negligence in the transportation of oil where the consignors were also consignees, but there was evidence that seamen also had an interest, *held*, that the consignors must be assumed to have right of action, there being no evidence that the seamen were either partners or joint owners, and they were not necessarily parties. *Swift v. Pacific Mail, etc., Co.* 105.

A carrier over part of a continuous line of transportation may (within reasonable limits and under such circumstances as are fairly incident to its legitimate corporate business) contract to carry from a point beyond its terminus to its terminus, and thence over its own route, as well as to carry beyond the terminus of its own route, and such contract is not *ultra vires*. *Swift v. Pacific Mail Co.* 105.

Where each of two connecting carriers forming continuous line is competent to contract alone for an entire line they may make a joint contract for such transportation and become jointly liable for loss or damage thereunder. *Swift v. Pacific Mail Co.* 105.

Where goods were shipped under a special contract and there is no conclusive evidence that the consignor accepted bills of lading in place of such contract, the latter fixes carrier's liability and cannot be abrogated or altered by carrier's subsequently signing and mailing bills of lading which did not reach the consignor (who was also the consignee) until after loss occurred. *Swift v. Pacific Mail Co.* 105.

Where an express agent, as such, accepts consignment of intoxicating liquors, knowing or suspecting contents, and delivers the same, he is liable to conviction under an indictment charging him with the illegal sale of such liquors; but to such conviction it is essential that

CARRIERS—Continued.

knowledge or at least a reasonable suspicion of the contents should exist. *State v. Goss.* 118.

Where the agent delivers the consignment at its terminus to a stage driver, who pays for it with money furnished by the consignee, delivery to him is delivery to the consignee, and the same rule applies. *State v. Goss.* 118.

An express company is not bound to transport and deliver intoxicating liquors if it would thereby incur a penalty; nor is such company or its agents presumed to know the contents of packages. *State v. Goss.* 118.

A carrier on receiving notice from the consignor to stop goods *in transitu* is bound to act in accordance therewith, although the notice contains no statement of the nature or basis of consignor's right. *Allen v. Maine Central R. Co.* 122.

If the consignor unreasonably refuse to subsequently furnish the carrier with evidence of his right, such refusal may be considered a waiver thereof; but in the absence of such unreasonable refusal the carrier who delivers after notice to stop is liable for the value of the goods. *Allen v. Maine Central R. Co.* 122.

Where goods were consigned and shipped in one car, but during transit were transferred to another, and consignor arranged with carrier's agents to have first-named car stopped, but did not thereby succeed in stopping the goods, and consignor's agent at destination frequently applied for the goods, but was told they had not arrived, and carrier claimed that notice of arrival had been sent by post-card, but there was no evidence to show that such notice had ever arrived, *held*, that there could be a recovery of the value of the goods at the time of conversion with interest as damages. *Worden v. Canadian Pacific R. Co.* 127.

A parcel of samples was delivered to the defendants, a railway company, to be forwarded to the plaintiffs. By the negligence of the defendants, who had notice that the parcel contained samples, it was delayed on the way until the season at which the samples could be used for procuring orders had elapsed, and they had in consequence become valueless. The plaintiffs could not have procured similar samples in the market. In an action for the non-delivery in a reasonable time, *held*, that the plaintiffs were entitled to recover as damages the value to them of the samples at the time when they should have been delivered. *Schulze & Co. v. The Great Eastern R. Co.* 134.

CARRIERS OF LIVE STOCK.

See CARRIERS.

Consignor made oral contract with carrier that cars should be furnished for shipping live stock on a day certain, and carrier knew of shipper's intention that they should arrive at destination in time for a particular market. Cars were not furnished. Two days later cattle were forwarded and consignor signed a bill of lading limiting carrier's liability. In an action by consignor for the special damages resulting, *held*, the parol undertaking was not merged in the bill of lading. *Held, further*, a charge to the jury that if the day of intended arrival was a sale day, and the best sale day, chosen by the shipper, and known to the carrier, and in contemplation of the parties when contracting, the consignor could recover the special damages actually

CARRIERS OF LIVE STOCK—Continued.

resulting, was correct. *Hamilton v. Western North Carolina R. Co.* 1.

Contract for carriage of live stock limited carrier's liability even in case of negligence to a fixed sum, in consideration of reduced freight. The car, bedded with straw, was placed next the engine and burned by sparks setting it on fire. Evidence tended to show that so placing a car was unusual and negligent. *Held*—1. That a petition alleging consignment to and loss by carrier through negligence authorized the introduction of evidence to sustain the allegations. 2. That provision of contract protecting against negligence was no defence. 3. That parol evidence was admissible between the parties to show that rate of freight was not reduced and shipper was not bound thereby. *McFadden v. Missouri Pacific R. Co.* 17.

Consignor's cattle were delayed and some of them injured by press of carrier's business. In action for damages, *held*, that a charge was correct which declared that the carrier was under a duty to carry within a reasonable time when it was modified in another instruction to mean that surrounding circumstances must be kept in view, and delay caused by unusual press of business was not unreasonable. *Illinois Central R. Co. v. Haynes.* 38.

After a witness has been asked on cross-examination if he had not sued defendant for damages arising out of the same delay, he may be asked, on re-direct examination, whether his suit had not been settled. *Illinois Central R. Co. v. Haynes.* 38.

It is not error to permit plaintiff, in such case, to contradict conductor of cattle train, by proving against his statement previously made, that he would testify as favorably as possible for defendant, which declaration he denied having made. *Illinois Central R. Co. v. Haynes.* 38.

In action against carrier for damage to live stock interest may be allowed from date of contract (if the suit is considered as *ex contractu*), or from the date of the injury (if the action be viewed as one in tort). *Illinois Central R. Co. v. Haynes.* 38.

In an action against a carrier for damage to live stock it is no defence that a defective car belonged to a connecting carrier, nor is the latter protected by a provision in the contract that the shipper accepted the car provided. *Wallingford v. Columbia, etc., R. Co.* 40.

When plaintiff, in such action, has proved shipment and injury he makes out a *prima facie* case, and burden of proof is on carrier to show that by lawful contract or common law he was not liable for the damage as it occurred. *Wallingford v. Columbia, etc., R. Co.* 40.

The laws of South Carolina do not permit a common carrier to exempt himself from liability for negligence. *Wallingford v. Columbia, etc., R. Co.* 40.

Under a Texas statute providing that carriers shall not limit their liability as it exists at common law by notice, or in any manner whatever, and that no agreement in contravention of its terms shall be valid, a carrier contracted that he should not be liable for damage to live stock, except such as arose from wilful negligence, and that shipper should give notice of his claim by a certain method, place and time, and the time named in contract was less than that prescribed by statute of limitations. *Held*, that the contract was in contravention of the statute, except as to the clause limiting the time for bringing suit, which was valid. *Gulf, Colorado, etc., R. Co. v. Trawick.* 49.

Where evidence showed that large shippers of cattle made an arrangement

CARRIERS OF LIVE STOCK—Continued.

at point of destination with three trunk lines to even up the live-stock tonnage between these lines, the eveners being required to make special purchases and shipments when necessary to agreed division of business, whether the market justified it or not, shippers to receive commissions on stock shipped by them or other persons, which contract was in operation when plaintiff shipped his stock,—in action by plaintiff to recover excess of freight over that charged other shippers, *held*, that in the absence of evidence that defendant was party in an arrangement with the eveners, plaintiff could not recover. *Rothschild v. Wabash, etc., R. Co.* 76.

CAR STEPS.

See PASSENGERS.

CATHEDRAL.

See RELIGIOUS CORPORATIONS.

CAUSE OF ACTION.

See AMENDMENT.

CEMETERIES.

The purpose of an ordinance providing that the boundaries of cemeteries should be fixed by the present inclosures, or by such boundaries as might appear on record in the map, plat or deeds of such cemetery, was to declare the boundaries by the limits of land actually prepared for burial purposes, and land not so devoted is not a part of the cemetery by being merely in the same inclosure, unless marked as a place of burial. A deed to a corporation empowering it to buy and sell land for burial purposes is not a deed creating a cemetery and prescribing its boundaries, and such corporation if compelled to buy lands not adapted to its purposes may sell them under the Illinois statute without their becoming a part of any cemetery. *Concordia Cemetery Association v. Minnesota, etc., R. Co.* 363.

Instructions to the jury in an action to condemn such land for railroad purposes, that if the evidence showed that at the passage of the ordinance the land was not so used or enclosed its value for cemetery purposes is not to be considered in determining the market value, were proper. *Concordia Cemetery Association v. Minnesota, etc., R. Co.* 363.

Under the Illinois statute damages may be assessed as to other parties in proceedings against a cemetery association to condemn land for a right of way. *Concordia Cemetery Association v. Minnesota, etc., R. Co.* 364.

CHALLENGE.

See JURY.

CHANCERY.

See INJUNCTION.

CHARGE OF COURT.

See PRACTICE.

The question whether defendant was first guilty of negligence should be submitted to the jury before allowing them to consider whether plaintiff was guilty of contributory negligence, since the submission of the latter question involves an assumption that there was already negligence on the other side. *Harmon v. Washington, etc., R. Co.* 627.

CHARTER.

See FRANCHISE; ULTRA VIRES.

The statute prescribing that the charter of railroad companies must set forth the time when and the manner in which the stock shall be paid for is complied with by the requirement in the charter that the stock shall be paid for in cash and no certificate shall issue until such payment is made. *New Orleans, etc., R. Co. v. Frank.* 275.

It is a sufficient compliance with the Maryland statute in requiring the certificate of incorporation of a railroad to state the names of the termini of the road and the counties and cities through which it is to pass that the termini be fixed in Maryland with reasonable certainty, and cities, etc., specified, and the fact that the route is described as partly through West Virginia does not invalidate the incorporation. *Piedmont, etc., R. Co. v. Speelman.* 316.

Where a railroad company supposed it had power to condemn the interest of the assignee of a lease of land through which it desired to run, said assignee refusing to sell, and where proceedings in which the original lessee had been made a party had failed, the remedy of the railroad company is to amend its charter and not by bill of injunction. *Piedmont, etc., R. Co. v. Speelman.* 316.

COMMISSIONERS.

See RAILROAD COMMISSIONERS.

COMMON CARRIER.

See CARRIERS; PASSENGERS.

COMPROMISE.

See NOLLE PROSEQUI.

Where a woman ill and poor was induced by a relative to accept a settlement and compensation for injuries occasioned on a railroad and in a short time repudiated the settlement, an instruction to the jury that such settlement was no bar to an action for damages was correct. *Stone v. Chicago, etc., R. Co.* 600.

CONDUCTOR.

See EVIDENCE.

CONNECTING CARRIERS.

See CARRIERS; CARRIERS OF LIVE STOCK.

In action against a carrier for damages to live stock it is no defence that a defective car belonged to a connecting carrier, nor is the latter protected by a provision in the contract that the shipper accepted the car provided. *Wallingford v. Columbia, etc., R. Co.* 40.

Certain charges of the court as to the contract of connecting roads, their respective liability thereunder, and as to measure of damages in actions against carriers for injury to live stock, *held* correct. *Wallingford v. Columbia, etc., R. Co.* 40.

A carrier over part of a continuous line of transportation may (within reasonable limits and under such circumstances as are fairly incident to its legitimate corporate business) contract to carry from a point beyond its terminus to its terminus, and thence over its own route, as well as to carry beyond the terminus of its own route, and such contract is not *ultra vires*. *Swift v. Pacific Mail Co.* 105.

Where each of two connecting carriers forming continuous line is competent to contract alone for an entire line, they may make a joint contract for such transportation and become jointly liable for loss or damage thereunder. *Swift v. Pacific Mail Co.* 105.

CONSEQUENTIAL DAMAGES.

See DAMAGES.

CONSOLIDATION.

See DISSOLUTION; FORECLOSURE.

In an action to recover damages on account of personal injuries received while in the employ of a company to which the defendant is successor, the old company having been dissolved by sale, *held*, that the action could not be maintained against the new company; the only right of action remaining is against the stockholders of the old company who received the purchase-money. *Chesapeake, etc., R. Co. v. Greist.* 149.

Under the Minnesota statute the purchase by one railroad of the property and franchises of another carries with it the liabilities of the latter, including above claim. *Town of Plainview v. Winona, etc., R. Co.* 259.

It is not material in condemnation proceedings to inquire as to the validity of an alleged consolidation agreement, nor as to the authority of officers of a road; the petition and proceeding being warranted by the provisions of the charter. *In re* Petition of Minneapolis, etc., R. Co. *v. St. Paul, etc., R. Co.* 279.

CONSTITUTIONAL LAW.

See INTERSTATE COMMERCE; MUNICIPAL AID BONDS.

CONSTRUCTION.

See BONDS; CONTRACTOR.

Railroad constructed on soil not belonging to owner of or to the corporation which built the road was movable [property, and as such under the law regulating pledges, the pledgee of the road may take legal

CONSTRUCTION—Continued.

possession through a third person chosen by him and the pledgor. *Woodward v. American, etc., R. Co.* 256.

A party whose materials sold to another are used in the construction of a work has no privilege on such work, the materials not being sold to the owner, his agent or his sub-contractor. *Woodward v. American, etc., R. Co.* 256.

CONTRACT.

See ASSIGNMENT; BILL OF LADING; CONTRACTOR; DAMAGES.

An agreement to pay a fixed sum to a railroad company, one half in 30 days after construction of road, and one half on the establishment of repair shops at a certain place, requires that the company should have under its control a road covering the entire distance and repair shops at said place for the whole road, and the securing access to terminus over another road was not sufficient, though unnecessary that the company should literally build the road to such terminus. *Brown v. Dibble.* 241.

An agreement under an unconstitutional statute for the issuance of bonds of a town between a railway company and the town is invalid, and the enforcement of such bonds may be resisted by the town. *Town of Plainview v. Winona, etc., R. Co.* 259.

CONTRACTOR.

See CONSTRUCTION; CONTRACT; TRESPASS.

Under revised laws of Vermont, railroads are liable to day-laborers employed by contractors for labor in constructing roads. *Held*, an action cannot be maintained in Vermont under this statute for work done on a contract made and performed in New York. *Cartwright v. N. Y. & Montreal R. Co.* 234.

Where suit is brought under Michigan statute providing that laborers and persons furnishing materials for construction and repairing of railroads shall have a right to have money due contractors of the company applied to their own claims, it was *held*, that the claims must be undisputed and acknowledged due from contractor, and an itemized bill to the contractor duly presented to the company. *Dudley v. Toledo, Ann Arbor & North Michigan R. Co.* 236.

An assignee of the claim for labor is entitled to all the benefits of the statute, but an order of the sub-director on a merchant is not an assignment of the laborer's claim, nor do bills for keep of teams or board of men employed on the road come within the act. *Dudley v. Toledo, Ann Arbor & Michigan R. Co.* 236.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE; PASSENGERS; PLEADING.

Notices of stock killed in accordance with Arkansas statute were posted at stations; plaintiff, in climbing up to read a notice for an owner unable to read, fell through a defective plank and was injured. *Held*—1. That the railroad was bound to keep platform in good repair for those having a legal right to use it, and was liable to plaintiff. 2. The

CONTRIBUTORY NEGLIGENCE—Continued.

fact that it was about dark when the plaintiff went upon the platform cannot, as a conclusion of law, be declared *per se* negligent. *St. Louis, etc., R. Co. v. Fairbairn.* 166.

Plaintiff walking on an elevated plank walk beside a railroad track at a station, hearing a train approaching behind, moved to the middle of the walk, where he would have been safe from passing cars of ordinary width. He was struck on the head by the brake-wheel of a car of extraordinary width and injured. *Held*, that he had a right to use the walk, and to suppose himself in safety in his position when struck, and was guilty of no negligence. *Held, further*, that the railroad's employee seeing him there, and knowing of the extraordinary projection of the brake, was guilty of negligence in not recognizing and guarding against the danger. *Sullivan v. Vicksburg, etc., R. Co.* 168.

In such case, where the jury awarded \$100 damages, the court, while averse to increasing verdicts which are rarely too small, awarded \$600 damages. *Sullivan v. Vicksburg, etc., R. Co.* 168.

Where injury was received while alighting from a passenger train although a stop was sufficient under ordinary circumstances, and the passenger was young, active and unincumbered, and though the company's failure to adequately light platform was not shown to have contributed directly to the injury, yet, the jury having found the railroad's negligence to have been the cause of the injury, the verdict will not be disturbed. *St. Louis, etc., R. Co. v. White.* 545.

A passenger who has done what all other persons have done for years is not guilty of want of ordinary care in failing to call for a light or assistance to a train though familiar with the situation. *Alabama, etc., R. Co. v. Arnold.* 546.

Leaving of cars outside the station grounds at which trains stop to take on and put off passengers, thus obstructing the city lights, violates the rule that railroad companies must provide for platforms, approaches, means of ingress and egress to and from the train, and servants to give necessary information, and a company is liable for an injury to the passengers seeking such car or cars standing outside and to which a sidewalk erected by the company leads directly, and from which the passenger falls by reason of the insufficient light, nor is it negligence on his part to go outside the yard to reach such car. *Moses v. Louisville, etc., R. Co.* 556.

Instructions to a jury that a passenger with a ticket bought at a regular station having entered a train, and the conductor having failed to stop a reasonable time, and the passenger having been injured without negligence on his part, the railroad is liable, and that if the train after stopping started before the passenger could alight, and he obeying the conductor's orders, the danger not being apparent, the train moving slowly, attempted to get off, provided he took no more risk than a prudent man would have taken, he was not guilty of contributory negligence,—is a correct statement of the law. *St. Louis, etc., R. Co. v. Person.* 567.

A refusal to instruct to find for defendant if the jury believed that the train stopped a reasonable length of time, and the passenger failing to get off leaped from it while in motion and in so doing was injured, is not error, because negligence is for the jury. *St. Louis, etc., R. Co. v. Person.* 567.

In an action for injuries received while alighting from a train, a charge that it is the duty of the conductor to assist passengers from the train is erroneous, and the standard of due care and caution on the part of

CONTRIBUTORY NEGLIGENCE—Continued.

one charged with contributory negligence is that ordinarily exercised by a prudent and reasonable man in possession of ordinary sense and capacity, and one physically deficient must be proportionally cautious. *Simms v. South Carolina R. Co.* 571.

Passenger who was thrown from the train by a sudden jerk while in the act of alighting, being on the platform in response to the railroad's invitation to alight, the station having been announced, is guilty of no negligence, and the railroad may be sued. *Norfolk & W. R. Co. v. Prinnell.* 574.

When the standard of duty shifts with the circumstances the question of negligence is for the jury; so that where a passenger crowds through incoming passengers getting on the train, and, finding on reaching the steps that the train has started, jumps off and is injured, and sues the railroad, the jury must say whether the railroad was guilty of negligence in admitting the passengers or starting the train, or whether the plaintiff was guilty of contributory negligence in jumping off. *Pennsylvania R. Co. v. Peters.* 607.

A street-car company is a common carrier; and though not an insurer, is bound to exercise the highest degree of skill and foresight not only in the safe carriage of passengers, but also in the running of its cars and the construction and repairs of its track, and failure to exercise such skill renders it liable for injuries to passenger not himself guilty of negligence. *Citizens Str. Co. v. Twiname.* 616.

It is error to refuse an instruction, based on evidence, that the defendant must prevail if it appear that plaintiff signalled to stop, the conductor rang the bell, the car slowed down, and plaintiff stepped from the car while in motion, and the question of defendant's negligence must be submitted to the jury before that of plaintiff's contributory negligence, the latter assuming the former. *Harmon v. Washington, etc., R. Co.* 627.

The whipping of horses by the driver of a car about to start, unless unusual, is no evidence of negligence where plaintiff sued for damages for injuries caused by being thrown from the front platform of a car by a sudden jolt on starting; and as the only witness to the whipping, the plaintiff, did not intimate it was severe, and as cars usually start with a jerk, and such jerk, being forward, could not, anyhow, throw the passenger sideways, there could be no recovery. *Rochat v. North Hudson Co. R. Co.* 644.

CONVEYANCE.

A railroad which received a conveyance from the board of trustees of the Wabash & Erie Canal of a portion of the land occupied and used under the series of laws which provided for the construction of that canal, in terms purporting to convey such lands in fee simple, acquired thereby such an estate therein. *Frank v. Evansville, etc., R. Co.* 224.

CORPORATIONS.

See CEMETERIES; PUBLIC DUTIES; RAILROADS; RELIGIOUS CORPORATIONS.

COVENANTS.

See LESSOR AND LESSEE.

CROSS-BILL OF EXCEPTIONS.

See BILL OF EXCEPTIONS; EXCEPTIONS.

CROSS-EXAMINATION.

See EVIDENCE.

CROSSINGS.

See EASEMENTS.

What evidence held sufficient to make out a case justifying building of branch roads and crossing other railroads under Minnesota statute. *In re* Petition of Minneapolis, etc., R. Co. *v.* St. Paul, etc., R. Co. 280.

Under the same act the location and manner of crossing are questions of fact, and cannot be reviewed. *In re* Petition of Minneapolis, etc., R. Co. *v.* St. Paul, etc., R. Co. 230.

Under the Illinois statutes one railway has no authority to appropriate a portion of the right of way of another company in order to construct parallel lines, and an allegation by the latter in such proceeding by the former that the whole right of way was necessary for the discharge of certain conditions imposed by the act of Congress granting the right of way does not entitle the removal of the cause to the United States Courts. Illinois, etc., R. Co. *v.* Chicago, etc., R. Co. 287.

Statute regulating the speed of trains at public crossings does not apply to cases in which the train is started at or upon the crossing. *Harris v.* Central R. Co. 581.

CULVERTS.

See WATERS AND WATERCOURSES.

DAMAGES.

See CEMETERIES; EJECTMENT; EVIDENCE; MORTGAGE; RELIGIOUS CORPORATIONS; TRESPASS.

Damages by Carriers of Goods and Live Stock.

Consignor made oral contract with carrier that cars should be furnished for shipping live stock on a day certain, and carrier knew of shipper's intention that they should arrive at destination in time for a particular market. Cars were not furnished. Two days later cattle were forwarded, and consignor signed a bill of lading limiting carrier's liability. In an action by consignor for the special damages resulting, *held*, the parol undertaking was not merged in the bill of lading. *Held, further*, a charge to the jury that if the day of intended arrival was a sale day, and the best sale day, chosen by the shipper and known to the carrier, and in contemplation of the parties when contracting, the consignor could recover the special damages actually resulting, was correct. *Hamilton v.* Western North Carolina R. Co. 1.

Consignor having arrangements for reduced rates of freight by a certain route shipped goods to be carried by that route, and informed carrier's agents of this fact. The carrier took them by as short or a

DAMAGES—Continued.

shorter route on which freight would have been less than by special route, but for consignor's special rates. *Held*, that carrier was liable for wilful breach of his valid contract, but only in nominal damages. *Langdon v. Robertson*. 23.

In action against carrier for damages to live stock interest may be allowed from date of contract (if the suit is considered as *ex contractu*), or from the date of the injury (if the action be viewed as one in tort). *Illinois Central R. Co. v. Haynes*. 38.

Certain charges of the court as to the contract of connecting roads, their respective liability thereunder, and as to measure of damages in actions against carriers for injury to live stock, *held* correct. *Wallingford v. Columbia, etc., R. Co.* 40.

Where goods were consigned and shipped in one car, but during transit were transferred to another, and consignor arranged with carrier's agents to have first-named car stopped, but did not thereby succeed in stopping the goods, and consignor's agent at destination frequently applied for the goods, but was told they had not arrived, and carrier claimed that notice of arrival had been sent by postal-card, but there was no evidence to show that such notice had ever arrived, *held*, that there could be a recovery of the value of the goods at the time of conversion with interest as damages. *Worden v. Canadian Pacific R. Co.* 127.

A parcel of samples was delivered to the defendants, a railway company, to be forwarded to the plaintiffs. By the negligence of the defendants, who had notice that the parcel contained samples, it was delayed on the way until the season at which the samples could be used for procuring orders had elapsed, and they had in consequence become valueless. The plaintiffs could not have procured similar samples in the market. In an action for the non-delivery in a reasonable time, *held*, that the plaintiffs were entitled to recover as damages the value to them of the samples at the time when they should have been delivered. *Schulze & Co. v. The Great Eastern R. Co.* 134.

In an action to recover damages on account of personal injuries received while in the employ of a company to which the defendant is successor, the old company having been dissolved by sale, *held*, that the action could not be maintained against the new company; the only right of action remaining is against the stockholders of the old company who received the purchase-money. *Chesapeake, etc., R. Co. v. Greist*. 149.

In a case of an injury occurring to one on station platform where the railroad was guilty of negligence and the plaintiff not negligent, an award of \$100 damages was increased by the court to \$600. *Sullivan v. Vicksburg, etc., R. Co.* 168.

In an action for damages caused by improper construction of railroad, plaintiff showed that his house was damaged and weakened by a flow of water so that, over seven months afterwards, it was destroyed by a storm with furniture and stores. *Held*, no recovery, as the damage was not a proximate result of the injury. The true measure of damages is the cost of repairs rendered necessary by the overflow and the inconvenience thereby caused. *Galveston, etc., R. Co. v. Ware*. 203.

In an action for damages for overflow of water on some land by faulty construction of railroads the measure of damages is the difference between the value of the plaintiff's land before the construction of said embankment and the value of the same immediately after said damage, if any was caused by said defendant. *Owens v. Missouri Pacific R. Co.* 205.

DAMAGES—Continued.*Damages in Eminent Domain Proceedings.*

- Where a railroad company excavating for railroad bed casts rock and débris on the adjoining land by blasting, it is liable to damages for the rents and profits lost to the plaintiff by removal of tenants, inability to rent property, and also damages for actual physical injury. *G. B. & L. R. Co. v. Eagles.* 228.
- The question whether the tenement could have been rented but for action of railway in casting rocks and débris upon land is improper on trial. *G. B. & L. R. Co. v. Eagles.* 228.
- Railroad company blasting rocks to build road bed is liable for damages to inn-keeper whose guests have left the hotel in fear of flying rocks. Evidence of injury to other buildings is allowable to prove justification of guests' departure. *G. B. & L. R. Co. v. Doyle.* 281.
- Where a contract under which a company took land showed the owners' purpose to be to hold the title until the damages were paid, the owner's right in equity to recover damages or possession is not barred by the Statute of Limitation for 15 years; and where the finding of the master as to the time when the sum found due commenced to draw interest is equivocal, no more can be allowed than is asked for by the bill, nor can it be amended. *Robinson v. Missisquoi, etc., R. Co.* 299.
- The acquiescence of the owners of lands in the use, construction, and maintenance of a railway company is a waiver of his action to dispossess the road, but not of his action for damages or for the value of the lands. *Lawrence v. Morgan's Louisiana, etc., R. Co.* 808.
- Where a land-owner brought suit to recover compensation for land taken against a railroad which had an assignment of a contract by which the owner agreed to convey the strip of land to another company, but previous to this assignment first company had entered on the ground and commenced construction, it was *held*, that having entered and built without reference to the agreement and independently thereof, it not having been assigned until after commencement of the road, the company were not entitled to conveyance, having already appropriated the land under the power of eminent domain, and the owner was not estopped from claiming the compensation, his right to which occurred upon the entering of the company. *Oregon, etc., R. Co. v. Day.* 333.
- Instructions that railroad companies are not required to fence their right of way for six months after opening of road to use, and the damages attending its keeping open for that time may be considered as an element of damages, are correct statements of the rule. *Centralia, etc., R. Co. v. Rixman.* 386.
- Where a railroad company entered on land, the owner not objecting, and commenced construction, which ceased after some time for want of funds, but subsequently was recommenced, there being no agreement as to damages nor any legal proceeding to adjust them, afterwards a bond having been filed, it was *held*, the title to the right of way vested by the original occupation, and tenants after such occupation operating thereon for oil were not entitled to damages. *Davis v. Titusville, etc., R. Co.* 341.
- Such rights of private use of land as interfere with the operation of road are included under the statute in condemnation proceedings, and in the compensation granted, and the owner has no reserved right of private crossings unless specified. *Cedar Rapids, etc., R. Co. v. Raymond.* 345.
- Evidence is admissible to show that land will be subject to extraordinary use from its vicinity to railroad depot, and an increase of rate of in-

DAMAGES—Continued.

- insurance may be shown as affecting the market value. Cedar Rapids, etc., R. Co. v. Raymond. 345.
- What evidence justifies damages awarded. Cedar Rapids, etc., R. Co. v. Raymond. 345.
- Equitable owner of land who becomes legal owner has lien for damages for land taken by railroad enforceable against a company in possession by succession to company first taking, but the value of the land actually taken, and not an agreement between the first company and the owner, is the measure of damages, and interest is recoverable from time of possession of such last company. Sennott v. St. Johnsbury, etc., R. Co. 349.
- Witnesses having knowledge of the market value of the property taken for railroad at the time it was so taken are competent to testify as to its value before and after the laying of the track. Central, etc., R. Co. v. Andrews. 352.
- A witness shown to have been in real-estate business for a long time, though not professing knowledge of the real value of adjacent lots to that on which the track was laid, but stating that he has an opinion of their market value, is qualified to give such opinion. Central, etc., R. Co. v. Andrews. 352.
- The statements as to value of lots made by party whose administrator brings an action and made a long time before or a long time after the laying of the track, the values of the property meanwhile fluctuating, are not evidence which may be introduced by the opposite party. Central, etc., R. Co. v. Andrews. 352.
- It is a rule in condemnation proceedings when several lots constitute one farm, that the damages to the whole are to be allowed though but part be taken, and the value of the farm without the railroad and its value with it may be shown. Cedar Rapids v. Ryan. 355.
- Damages to a whole tract are properly considered, and evidence of the market value of property before appropriation by the railroad and after is properly received. The eligible situation of land and its effect upon the present value may be considered, but not opinions as to probable future use. Cedar Rapids v. Ryan. 357.
- All damages from the construction of a road are allowed in proceedings to condemn the land, and include the subsequent completion of a railroad bridge in an ordinary manner. Barnes v. Michigan, etc., R. Co. 361.
- Instruction that the total compensation for the taking of land was the difference between the value before condemnation and the value after of entire tract through the middle of which railroad had taken a strip, was held proper. Concordia Cemetery Association v. Minnesota, etc., R. Co. 363.
- Under the Illinois statute damages may be assessed as to other parties in proceedings against a cemetery association to condemn land for a right of way. Concordia Cemetery Association v. Minnesota, etc., R. Co. 364.
- In assessing the value of land taken for a right of way, there being no conclusive evidence as to its value, evidence of sales of prairie land one mile distant is admissible. Concordia Cemetery Association v. Minnesota, etc., R. Co. 364.
- The value of lots in other cemeteries is not competent evidence in assessing land, part of a tract owned by a cemetery association but not used for cemetery purposes, and the verdict of the jury making such assessment will not be set aside as being too small, a greater value being a

DAMAGES—Continued.

- matter of future probability. *Concordia Cemetery Association v. Minnesota, etc., R. Co.* 364.
- An entry by a railroad company without fraud, though by right of proceedings under defective ordinances, does not entitle plaintiff to exemplary damages. *Baltimore, etc., R. Co. v. Boyd.* 372.
- The owner of premises subjected to unauthorized beneficial use of another, though under color of right, may have substantial damages, such being the fair rental value of the land, though no special damage is proven. *Baltimore, etc., R. Co. v. Boyd.* 372.
- Declarations of counsel on a former occasion are not admissible to prove malice on defendant's part in order to enhance the damages, nor will counsel be permitted to argue to the jury in disregard of instructions of court. *Baltimore, etc., R. Co. v. Boyd.* 372.
- Absolute freehold title and not merely possession is necessary to obtain damages of a railroad taking land outside of that condemned for its right of way, whereby a permanent injury to the freehold was caused. *Wattmeyer v. Wisconsin, etc., R. Co.* 384.
- A plaintiff alleging damages to 160 acres cannot prove damages to entire farm of 240 acres. *Wattmeyer v. Wisconsin, etc., R. Co.* 384.
- Where the report of commissioners condemning land for railroad use included the value of buildings erected thereon, the buildings passed with the land, and the owner, having appealed and then dismissed the appeal and accepted the amount of award, is estopped from claim in possession of or removing the buildings. *Chicago, etc., R. Co. v. Knuffke.* 387.
- A railroad company offered to owner a strip of land for access to property in exchange for entry taken by them; the agreement was not recorded, or brought to public attention or public use. *Held*, there was no establishment of a public way such as would benefit the owner, nor was there a creation of an easement, and under the Colorado statutes the commissioners condemning the land could not consider the agreement, a money compensation being intended for lands condemned for railroad purposes. *Burlington v. Schwerkart.* 391.
- A provision of the Iowa code forbidding the laying of a track in the street until abutters' damages are paid does not debar owners of property abutting on the street who have waited until after the construction of the railway from claiming damages. *Slough v. Chicago, etc., R. Co.* 396.
- Under the Iowa code the sheriff's jury can only assess damages taken by a railroad, and not for injury to property abutting on a street in which the road is laid; nor are objections to the jurisdiction of such sheriff's jury waived by an appeal from their award. *Slough v. Chicago, etc., R. Co.* 396.
- Smoke and noise caused by the operation of a railroad on land taken by eminent domain, and abutting on a public street, though diminishing the value of houses thereon is *damnum absque injuria* for which no compensation may be granted under the Pennsylvania constitution. *Pennsylvania R. v. Lippincott.* 399.
- Evidence of substantial injury to property in common to community at large, caused by smoke, etc., from the running of a railroad in front of the property may be considered in an action by the owner to recover for injury by laying of track, said property abutting on a public street. *Columbus, etc., R. Co. v. Gardner.* 409.
- Witness in such case may not testify as to differences in value of the property or give opinions as to the amount of damages. *Columbus, etc., R. Co. v. Gardner.* 409.

DAMAGES—Continued.

An elevated railroad is a trespass against abutting owners not duly compensated, and damages for injury actual or incidental to its use are recoverable. *Drucker v. Manhattan, etc., R. Co.* 418.

Elements of damage such as smoke, ashes, etc., even the structure itself, though necessary to construction and operation of road and not the product of negligence, are considered in estimating the verdict. *Drucker v. Manhattan, etc., R. Co.* 418.

Damages by Carriers of Passengers.

In an action for damages for an injury caused by the falling from a rack of a wringer, having nothing about it to attract particular attention, the denial of a motion for nonsuit was error. *Morris v. New York, etc., R. Co.* 538.

Where it is the usage of a railroad to leave an opening between the cars of a freight train as means of access to a passenger train it is an invitation for such use, and an injury occasioned by the sudden and unsignalled closing of the train will render the company liable if the passenger acted in a reasonable and prudent manner. *Louisville, etc., R. Co. v. Thompson.* 541.

\$15,000 are not excessive damages for a broken thigh and other permanent injuries caused by negligence of a railroad company. *Louisville, etc., R. Co. v. Thompson.* 541.

When negligence is so gross as to indicate that defendant, although cognizant of, is indifferent to the danger, exemplary damages may be awarded, and the degree of negligence being a question for the jury, instruction that such damages cannot be recovered is properly refused. *Ala., etc., R. Co. v. Arnold.* 546.

Damages allowed by a jury will not be increased on appeal unless manifestly inadequate. *Moses v. Louisville, etc., R. Co.* 556.

A passenger by reason of failure to stop the train was carried beyond the station for which he had purchased a ticket. *Held*, exemplary damages could not be recovered for the separation from his family; the failure to stop not being wilful or attended with malicious, insulting, or oppressive circumstances. *Dorrah v. Illinois Cent. R. Co.* 576.

Instruction that plaintiff is entitled to recover damages such as compensate under all the evidence for all the injuries received and suffered is not objectionable as allowing exemplary damages. *Chicago, etc., R. Co. v. Holland.* 590.

An instruction that the jury must consider, in giving damages, plaintiff's condition before and since the injuries, and present and future mental and bodily pain with all the circumstances, was, under those circumstances, proper. *Sidekum v. Wabash, etc., R. Co.* 640.

An objection which might have been interposed to remarks of counsel will be considered as waived by appellant court if not made or exception saved, the damages not appearing excessive. *Sidekum et al. v. Wabash, etc., R. Co.* 640.

DAMNUM, ABSQUE INJURIA.

See DAMAGES.

DAMS.

See WATERS AND WATERCOURSES.

DEATH.

See PARTIES TO ACTIONS.

DEBTOR AND CREDITOR.

See MORTGAGES; RECEIVERS.

DECLARATION IN EVIDENCE.

See EVIDENCE.

DECLARATION IN PLEADING.

An amendment to a declaration charging negligence different from that originally relied upon, but not changing the cause of action, may be allowed even pending introduction of evidence by defendant, so that the pleadings may conform to the evidence. *Harris v. Central R. Co.* 581.

DECREE.

See FORECLOSURE.

Decree in equity broader than is required will be construed only as necessary for the purpose of the case, and the issues decided. *Barnes v. Chicago, etc., R. Co.* 458.

What is a final decree from which an appeal can be taken. *Porter v. Pittsburgh, etc., Co.* 472.

DEED.

See CEMETERIES; HUSBAND AND WIFE.

The words "for the use of a plank road" added to the description of the land in the granting part of the deed constitute a limitation upon the grant, and the deed conveys but an easement. *Robinson v. Missisquoi R. Co.* 299.

A deed under the judicial sale of the property and franchises of a railroad that has commenced construction is within recording acts. *Davis v. Titusville, etc., R. Co.* 341.

DELAY.

• See CARRIERS; CARRIERS OF LIVE STOCK; DAMAGES.

Consignor's cattle were delayed and some of them injured by press of carrier's business. In action for damages, *held*, that a charge was correct which declared that the carrier was under a duty to carry within a reasonable time, when it was modified in another instruction to mean that surrounding circumstances must be kept in view, and delay caused by unusual press of business was not unreasonable. *Illinois Central R. Co. v. Haynes.* 38.

Carrier undertook to deliver cotton for shipment by steamer to Shippers' Compress Company by a certain time. Its agent had timely notice

DELAY—Continued.

of the effect of the delay which subsequently occurred. The Compress Company was obliged to pay demurrage, and in its suit against the carrier to recover it was *held* that subsequent acceptance of the cotton was not a waiver of stipulation as to time, and that the carriers' contract was not *ultra vires*. *Norfolk & Western R. Co. v. Shippers' Compress Co.* 57.

Where the weight of goods is not specified in the bill of lading carrier must weigh within reasonable time and fix charges according to rate specified in the bill of lading. For failure to do so and refusal to deliver it is liable to penalty for delay imposed by statute. *Little Rock, etc., R. Co. v. Hanniford.* 76.

DELIVERY.

See CARRIERS; CARRIERS OF LIVE-STOCK.

A, on receiving an order from B, doing business at Pueblo, Col., shipped consignment to himself at that place and received two receipts from the carrier; one of these he indorsed to B, attached it to a draft and sent it to Pueblo for collection; the other was sent to B without indorsement. B presented this last receipt to the carrier and obtained the goods; the carrier had no knowledge of the receipt and draft; B refused to pay for the goods, and was insolvent. In an action against the carrier for the value of the goods, *held*, that the possession by B of the receipt clothed him with such an apparent right to the goods as relieved the carrier [of liability]. *Weyland v. Atchison, etc., R. Co.* 102.

DEMURRER.

See PLEADING.

DEVIATION.

See CARRIERS; CARRIERS OF LIVE-STOCK.

Consignor having arrangements for reduced rates of freight by a certain route, shipped goods to be carried by that route and informed carrier's agents of this fact. The carrier took them by as short or a shorter route on which freight would have been less than by special route but for consignor's special rates. *Held*, that carrier was liable for wilful breach of his valid contract, but only in nominal damages. *Langdon v. Robertson.* 23.

DIRECTORS.

See DIVIDENDS; OFFICERS.

DISCRIMINATION.

See FREIGHT.

DISSOLUTION.

See CONSOLIDATION; FRANCHISE.

Entire capital stock and more was expended by a railroad in building and equipping. Bonds were issued, but the indebtedness had not been liquidated nor the interest on the bonds paid; under a New Jersey statute a bill was filed and a receiver appointed; on motion to dissolve and dismiss, *held*, that the facts justified a conclusion of insolvency within the statute and authorized a receiver's appointment. *Held, further*, the court should get rid of a receiver at the earliest possible moment consistent with the interest of creditors and stockholders, and that when the admitted liabilities and receiver's expenses are paid he will be discharged. *Sewell v. Cape May, etc., R. Co.* 155.

DIVIDENDS.

See GUARANTY.

When holders of preferred stock are entitled to a dividend. *Hazeltine v. Belfast, etc., R. Co.* 528.

Directors of railroad company are not justified in refusing to declare dividend to preferred stockholder from earnings on hand merely because the corporation cannot pay all of its funded mortgage indebtedness at maturity if dividends be paid, and the court will compel such action when the question becomes one more of right than of discretion. *Hazeltine v. Belfast, etc., R. Co.* 528.

DOORSTEP.

See NEGLIGENCE.

DRIVER.

See MASTER AND SERVANT.

EASEMENT.

See DAMAGES; EMINENT DOMAIN.

The words "for the use of a plank road" added to the description of the land in the granting part of the deed constitute a limitation upon the grant, and the deed conveys but an easement. *Robinson v. Missisquoi R. Co.* 299.

The existence of a highway on land being a collateral matter may be shown by oral evidence in an action for the assessment of damages for the taking of land by a railway. *Cedar Rapids, etc., R. Co. v. Raymond.* 345.

Such rights of private use of land as interfere with the operation of a road are included under the statute in condemnation proceedings, and in the compensation granted, and the owner has no reserved right of private crossings unless specified. *Cedar Rapids, etc., R. Co. v. Raymond.* 345.

EJECTMENT.

See DAMAGES; EMINENT DOMAIN.

The fact that a company which had taken land had mortgaged it is no defence in an action of ejectment, there being no proof that the plaintiffs knew of the execution of the mortgages, and therefore no estoppel. *Bradley v. Mo., etc., R. Co.* 379.

Right of wife signing deed with her husband conveying her property, but whose name does not appear in the body of it, to maintain ejectment against grantee. *Bradley v. Mo., etc., R. Co.* 379.

Railroad company taking property must pursue the provisions of the law, and take initiatory steps for the appropriation of land or else cannot rightfully hold the property until damages are assessed and paid, and ejectment is a proper remedy. *Bradley v. Mo., etc., R. Co.* 379.

ELEVATOR COMPANY.

See ULTRA VIRES.

ELEVATED RAILROAD.

See EMINENT DOMAIN.

EMINENT DOMAIN.

See CONTRACTORS; DAMAGES (*Eminent-Domain Proceedings*); PRACTICE.

That section of the Illinois practice act forbidding the dismissal of an action except where a plea of set-off has been interposed in an action on a contract does not apply in a proceeding in a condemnation of land for railroad purposes, and such proceeding may be dismissed by a petitioner any time before rights become vested in the land-owner; the company having the right to abandon one route and select another. *Chicago, etc., R. Co. v. Gates.* 268.

Parties may be compelled to trial in condemnation proceedings before disposal of a plea of *nul tiel* corporation; there being no law in Illinois allowing any kind of answer to a petition for the condemnation of land. *Henry v. Centralia, etc., R. Co.* 273.

In such proceedings certain copies of articles of incorporation of a railroad company may be admitted in evidence, and if satisfactory to the court introduced to the jury. *Henry v. Centralia R. Co.* 273.

The verdict of a jury of the vicinage will not be disturbed in an expropriation proceeding for the right of way unless inconsistent with the proof in the record or unsupported by the evidence. *New Orleans, etc., R. Co. v. Frank.* 275.

In the absence of proof that a committee of citizens were constituted agents of a property-owner, the latter is not estopped from proceeding under the Iowa statute for land damages, though the company constructed its road on representation of the committee of authority of the land-owner. *Chicago, etc., R. Co. v. Estes.* 276.

It is not material in condemnation proceedings to inquire as to the validity of an alleged consolidation agreement, nor as to the authority of officers of a road, the petition and proceeding being warranted by the provisions of the charter. *In re* Petition of Minneapolis, etc., R. Co. and St. Paul, etc., R. Co. 279.

What evidence *held* sufficient to make out a case justifying building of

EMINENT DOMAIN—Continued.

- branch roads and crossing other railroads under Minnesota statute. *In re* Petition of Minneapolis, etc., R. Co. and St. Paul, etc., R. Co. 280.
- Under the same act the location and manner of crossing are questions of fact, and cannot be reviewed. *In re* Petition of Minneapolis, etc., R. Co. and St. Paul, etc., R. Co. 280.
- Under the Illinois statutes one railway has no authority to appropriate a portion of the right of way of another company in order to construct parallel lines, and an allegation by the latter in such proceeding by the former that the whole right of way was necessary for the discharge of certain conditions imposed by the act of Congress granting the right of way does not entitle the removal of the cause to the United States courts. Illinois, etc., R. Co. *v.* Chicago, etc., R. Co. 287.
- Under the Minnesota statute a railway company has no absolute right, at its own mere election, to a crossing over the road of another company. It must first be determined whether such crossing is necessary and required by public interests. *In re* Proceeding St. Paul, etc., R. Co. 294.
- One who has notice claiming title under a land-owner who licensed a railroad company to enter upon his land, and the company entered and constructed and maintained a road thereon, is estopped from revoking the said license. Campbell *v.* Indianapolis R. Co. 304.
- Occupancy and use of land, and the running of trains, is sufficient notice of license to railroad, to purchaser from licensor. Campbell *v.* Indianapolis R. Co. 305.
- Under the Indiana statute giving a railroad power to lay out its road not exceeding six rods wide, it will be presumed as against one claiming under a licensor of a railroad who has entered upon and constructed its road that the right of way extended to the full statutory width. Campbell *v.* Indianapolis R. Co. 305.
- Franchises such as to run cars, take tolls, appropriate earth, etc., are rights or franchises essential to the operation of the railroad corporation, and such franchises include the right of appropriating lands for the construction of necessary appurtenances. Lawrence *v.* Morgan's Louisiana, etc., R. Co. 309.
- Such franchise is transferred at a marshal's sale of the railroad and all its franchises to the purchaser, even if he is a natural person. Lawrence *v.* Morgan's Louisiana, etc., R. Co. 310.
- It is a sufficient compliance with the Maryland statute requiring the certificate of incorporation of a railroad to state the names of the termini of the road and the counties and cities through which it is to pass, that the termini be fixed in Maryland with reasonable certainty, and cities, etc., specified, and the fact that the route is described as partly through West Virginia does not invalidate the incorporation. Piedmont, etc., R. Co. *v.* Speelman. 316.
- An assignee of a lease of land through which a railroad seeks to condemn a right of way will not be granted an injunction to prevent it from so doing, but will be left to his remedy at law; the assignee being president of a rival road and denying the power of the other company to condemn the land. Piedmont, etc., R. Co. *v.* Speelman. 316.
- Where a railroad company supposed it had no power to condemn the interest of the assignee of a lease of land through which it desired to run, said assignee refusing to sell, and where proceedings in which the original lessee had been made a party had failed, the remedy of the railroad company is to amend its charter and not by bill of injunction. Piedmont, etc., R. Co. *v.* Speelman. 316.

EMINENT DOMAIN—Continued.

The fee in land taken for a railroad remains with the owner of the land, and the railroad has no right as against him to give away grass cut by his servants upon the land. *Bailey v. Sweeney*. 328.

A case in which it is left by statute to the discretion of the court to make an order to allow the jury to view the premises. *Coughlin v. Chicago, etc., R. Co.* 330.

Under the Illinois eminent-domain act, judges of the county court have power in vacation to hear condemnation cases, set aside the verdict, and order a new trial. *Centralia, etc., R. Co. v. Rixman*. 336.

Company first making a survey and setting out the centre line of road is entitled to priority on a question of location. *Davis v. Titusville, etc., R. Co.* 341.

The existence of a highway on land being a collateral matter may be shown by oral evidence in an action for the assessment of damages for the taking of land by a railway. *Cedar Rapids, etc., R. Co. v. Raymond*. 345.

Such rights of private use of land as interfere with the operation of a road are included under the statute in condemnation proceedings, and in the compensation granted, and the owner has no reserved right of private crossings unless specified. *Cedar Rapids, etc., R. Co. v. Raymond*. 345.

Equitable owner of land who becomes legal owner has lien for damages for land taken by railroad enforceable against a company in possession by succession to company first taking, but the value of the land actually taken, and not an agreement between the first company and the owner, is the measure of damages, and interest is recoverable from time of possession of such last company. *Sennott v. St. Johnsbury, etc., R. Co.* 349.

The purpose of an ordinance providing that the boundaries of cemeteries should be fixed by the present inclosures, or by such boundaries as might appear on record in the map, plat, or deeds of such cemetery, was to declare the boundaries by the limits of land actually prepared for burial purposes, and land not so devoted is not a part of the cemetery by being merely in the same inclosure, unless marked as a place of burial. A deed to a corporation empowering it to buy and sell land for burial purposes is not a deed creating a cemetery and prescribing its boundaries, and such corporation if compelled to buy lands not adapted to its purposes may sell them under the Illinois statute without their becoming a part of any cemetery. *Concordia Cemetery Association v. Minnesota, etc., R. Co.* 363.

An entry by a railroad company without fraud, though by right of proceedings under defective ordinances, does not entitle plaintiff to exemplary damages. *Baltimore, etc., R. Co. v. Boyd*. 372.

The owner of premises subjected to unauthorized beneficial use of another, though under color of right, may have substantial damages, such being the fair rental value of the land, though no special damage is proven. *Baltimore, etc., R. Co. v. Boyd*. 372.

Railroad company taking property must pursue the provisions of the law, and take initiatory steps for the appropriation of land, or else cannot rightfully hold the property until damages are assessed and paid, and ejectment is a proper remedy. *Bradley v. Mo., etc., R. Co.* 379.

The fact that a company which had taken land had mortgaged it is no defence in an action of ejectment, there being no proof that the plaintiffs knew of the execution of the mortgages and therefore were not estopped. *Bradley v. Mo., etc., R. Co.* 379.

EMINENT DOMAIN—Continued.

Absolute freehold title and not merely possession is necessary to obtain damages of a railroad taking land outside of that condemned for its right of way, whereby a permanent injury to the freehold was caused.

Wattmeyer v. Wisconsin, etc., R. Co. 384.

A plaintiff alleging damages to 160 acres cannot prove damages to entire farm of 240 acres. *Wattmeyer v. Wisconsin, etc., R. Co.* 384.

Authority and assent of a railroad company to a trespass by a sub-contractor in appropriating uncondemned land must be proven to hold it liable. *Wattmeyer v. Wisconsin, etc., R. Co.* 384.

Where the report of commissioners condemning land for railroad use included the value of buildings erected thereon, the buildings passed with the land, and the owner, having appealed and then dismissed the appeal and accepted the amount of award, is estopped from claiming possession of or removing the buildings. *Chicago, etc., R. Co. v. Knuffke.* 387.

A railroad company offered to owner a strip of land for access to property in exchange for entry taken by them; the agreement was not recorded, or brought to public attention or public use. *Held*, there was no establishment of a public way such as would benefit the owner, nor was there a creation of an easement, and under the Colorado statutes the commissioners condemning the land could not consider the agreement, a money compensation being intended for lands condemned for railroad purposes. *Burlington v. Schwerkart.* 391.

A provision of the Iowa Code forbidding the laying of a track in the street until abutters' damages are paid does not debar owners of property abutting on the street who have waited until after the construction of the railway from claiming damages. *Slough v. Chicago, etc., R. Co.* 396.

Under the Iowa Code the sheriff's jury can only assess damages taken by a railroad, and not for injury to property abutting on a street in which the road is laid; nor are objections to the jurisdiction of such sheriff's jury waived by an appeal from their award. *Slough v. Chicago, etc., R. Co.* 396.

Circuit court, having no jurisdiction on such appeal, properly refused to entertain other objections or to determine the rights of parties if properly presented. *Slough v. Chicago, etc., R. Co.* 396.

It is too late on appeal to raise the question whether the plaintiff owned the fee or an easement in the street, trial below being on the assumption that he did, and the action being to recover from impairment of easement by operation of an elevated railway. *Drucker v. Manhattan, etc., R. Co.* 418.

A railroad company taking land for construction is required either to take the whole of the block of land belonging to a religious association for the purpose of building a cathedral, but which had not completed the building for lack of funds, or having taken part to withdraw from paying all damages and costs. The land thus set apart had not lost its distinctive ecclesiastical character, though the building was not completed. *Cathedral v. West Ontario, etc., R. Co.* 422.

Under the Illinois statute the fencing of a railroad should embrace entire right of way. *Ohio, etc., R. Co. v. People.* 427.

Mandamus is the proper proceeding to compel railroad to construct fences under the statute. *Ohio, etc., R. Co. v. People.* 427.

A railroad company under agreement to take land at a price fixed by condemnation proceedings refused to pay the consideration without a release of the mortgage incumbrances. *Held*, that so much of the

EMINENT DOMAIN—Continued.

award as was for the benefit of the owners should be applied to their incumbrances upon proof made of its investment in a sinking fund as required by one of the mortgages, and that so much as was for the lessee's interest was applicable to the remaining mortgages in the order of priority. *Long Dock Co. v. Morris, etc., R. Co.* 481.

EQUITY.

[See **INJUNCTION**.

Decree in equity broader than is required will be construed only as necessary for the purpose of the case, and the issues decided. *Barnes v. Chicago, etc., R. Co.* 458.

ERROR.

See **EXCEPTIONS**.

There is no harm in the denial of a motion in an action for personal injuries that plaintiff submit to an examination of two physicians when such examination was made by one physician of defendant previously and another afterwards, and after that one named in the motion also examined plaintiff. *Chicago, etc., R. Co. v. Holland.* 590.

An objection that evidence to prove an amount incurred for medical services is incompetent, immaterial and irrelative is too general to cover an objection that there was no proof that any of the physicians were entitled to practise medicine. *Chicago, etc., R. Co. v. Holland.* 590.

The jury having been fully instructed, a refusal of the court to charge further in relation thereto though the requests contained the correct law is not error. *Chicago, etc., R. Co. v. Holland.* 590.

The misnomer in a charge of a witness to whose testimony the court refers is not ground for reversal; the jury not having been misled. *Pennsylvania, R. Co. v. Peters.* 607.

An instruction is objectionable which assumes the existence of any disputed fact, and hypotheses, especially those of utterly inexcusable conduct, unsupported by any evidence, are not to be submitted to the jury as grounds in arriving at a verdict. *Harmon v. Washington, etc., R. Co.* 627.

An objection which might have been interposed to remarks of counsel will be considered as waived by appellate court if not made or exception saved, the damages not appearing excessive. *Sidekum et al, v. Wabash, etc., R. Co.* 640.

If the court erroneously refuses to nonsuit for want of evidence of defendant's responsibility, exception is sealed and the defect in proof is not subsequently remedied, error may be assigned upon the exception and the judgment reversed. *Rochat v. North Hudson Co. R. Co.* 646.

ESCHEAT.

A foreign corporation purchased the capital stock of a Pennsylvania mining company, reorganized the same, and under its name purchased coal lands. *Held*, that if the purchaser's purpose was a mere device to evade a Pennsylvania statute providing against foreign corporations holding real estate unless authorized by Pennsylvania law, and if the foreign corporation was the real owner, and the name of the other

ESCHEAT—Continued.

company had been merely used to cover the scheme, the land purchased was subject to escheat. *Commonwealth v. New York, etc., R. Co. et al.* 186.

The testimony before the jury in the above case would have warranted a finding of the issue of facts in favor of the commonwealth, and hence the trial court erred in directing a verdict for the defendant. *Commonwealth v. New York, etc., R. Co. et al.* 186.

ESTOPPEL.

See DAMAGES.

One who has notice claiming title under a land-owner who licensed a railroad company to enter upon his land, and the company entered and constructed and maintained a road thereon, is estopped from revoking the said license. *Campbell v. Indianapolis, R. Co.* 304.

EVIDENCE.

See BURDEN OF PROOF; DAMAGES; EXAMINATION.

In action against carrier, where failure to deliver goods is not explained by carrier it may be inferred that they are in carrier's hands and withheld. *Adams Express Co. v. Holmes.* 14.

Contract for carriage of live stock limited carrier's liability even in case of negligence to a fixed sum, in consideration of reduced freight. The car, bedded with straw, was placed next the engine, and burned by sparks setting it on fire. Evidence tended to show that so placing a car was unusual and negligent. *Held*—1. That a petition alleging consignment to and loss by carrier through negligence authorized the introduction of evidence to sustain the allegations. 2. That provision of contract protecting against negligence was no defence. 3. That parol evidence was admissible between the parties to show that rate of freight was not reduced and shipper was not bound thereby. *McFadden v. Missouri Pacific R. Co.* 17.

After a witness has been asked on cross-examination if he had not sued defendant for damages arising out of the same delay, he may be asked, on re-direct examination, whether his suit had not been settled. *Illinois Central R. Co. v. Haynes.* 38.

It is not error to permit plaintiff, in such case, to contradict conductor of cattle train, by proving, against his statement previously made, that he would testify as favorably as possible for defendant, which declaration he denied having made. *Illinois Central R. Co. v. Haynes.* 38.

Where plaintiff, in such action, has proved shipment and injury, he makes out a *prima facie* case, and burden of proof is on carrier to show that by lawful contract or common law he was not liable for the damage as it occurred. *Wallingford v. Columbia, etc., R. Co.* 40.

“ Motion for nonsuit was properly refused where evidence was conflicting. It is not for the court to determine conflicting evidence. *Wallingford v. Columbia, etc., R. Co.* 40.

Provisions of Georgia Code as to failure of carrier to deliver goods to a connecting carrier and penalty therefor, and as to discrimination in rates of freight by one carrier against another, construed. An order of a railroad relating to certain kinds of merchandise shipped in competition to a certain point on its road, and discriminating as to rates,

EVIDENCE—Continued.

construed. *Held*, that a shipper compelled to sell merchandise at a loss because of such order could be permitted to testify to that effect, and that under the provisions of the code above mentioned all the elements of actual damage which are admissible in other actions may be shown. *Central Railroad, etc., Co. v. Logan.* 68.

A railroad turn-table was located on depot grounds six feet from a street very little used, and had stood there fifteen years. A night-watchman of the railroad, who had known since first built of its danger, fell into it at night and brought action for his injuries. There was no statute requiring the company to fence the depot ground. *Held*, no recovery; negligence will not be presumed from the bare fact of an accident occurring on railroad property; and evidence of other and previous accidents occurring at the same place was inadmissible. *Early v. Lake Shore, etc., R. Co.* 168.

In an action against a railroad for injury by the overflow of a river caused by insufficient culverts, the overflow was an unusual one, but it was shown that, in three previous years, similar floods occurred. *Held*, that if the overflow was so extraordinary as not to have been reasonably anticipated the railroad was not liable; but if, although the flood was extraordinary, it might reasonably have been anticipated the railroad was liable; and previous floods warranted jury in finding that it should reasonably have been anticipated. *Gulf, etc., R. Co. v. Pomeroy.* 200.

Where, in action for damage by surface-water, certain witnesses declared that the standing water was wholly caused by the railroad embankment, and other witnesses declared that the embankment did not affect the flow of water, and a verdict was given for plaintiff, *held*, that the verdict would not be set aside because the evidence would have sustained a verdict for a larger sum, nor could it be said that the jury found against the evidence as to the cause of the standing water. *Owens v. Missouri Pacific R. Co.* 205.

The question whether the tenement could have been rented but for action of railway in casting rocks and debris upon land is improper on trial. *G. B. & L. R. Co. v. Eagles.* 228.

The statement of one of the directors of the railroad company and superintendent of the construction for the railroad company: what is proven by it. *Dudley v. Toledo, Ann Harbor & Michigan R. Co.* 236.

In eminent-domain proceedings certified copies of articles of incorporation of a railroad company may be admitted in evidence, and if satisfactory to the court introduced to the jury. *Henry v. Centralia R. Co.* 273.

Plaintiff's testimony as to statement of attending surgeon that the operation was a dangerous one is hearsay evidence and inadmissible. *Ala., etc., Rar. Co. v. Arnold.* 546.

Hearsay evidence of the fact of the killing of some one upon a certain day, and showing the date at which something else occurred about which witnesses testify, is not evidence of the date of the killing or of the fact itself. *Harris v. Central, etc., R. Co.* 581.

Evidence that at a former trial the defendant relied upon a different defence to the charge of negligent killing than that relied upon in the present trial is inadmissible. *Harris v. Central, etc., R. Co.* 581.

The allowance of a question in misreciting witness's testimony and calculated to lead him into error is in the discretion of the court. *Harris v. Central, etc., R. Co.* 581.

The jury must decide whether the railroad is liable for using improper means to clear a train of boys improperly on it whereby the boy ejected

EVIDENCE—Continued.

received injuries from which he died. Vicksburg, etc., R. Co. v. Phillips. 587.

Under the Mississippi code prescribing that proof of injury inflicted by trains in motion shall be *prima facie* evidence of want of reasonable skill and care on the part of the railroad's servants, an instruction that the question of care or skill is for the jury is correct, and such part of the code is applicable even where the injury sued for resulted from a precedent wrong of the person injured, and equally where there are a number of witnesses as when seen only by the railroad's servants, though enacted to meet the latter exigency. Vicksburg, etc., R. Co. v. Phillips. 587.

Declarations of conductor just before a collision showing the situation of the train, and that plaintiff's train had not been flagged, are admissible as part of the *res gestæ*; and a witness having stated the contents of a letter on direct examination, the original may be introduced in cross examination: Chicago, etc., R. Co. v. Holland. 590.

Opinions of medical experts based upon testimony not believed by the jury, or on a state of facts assumed by the expert, are valueless. Stone v. Chicago, etc., R. Co. 600.

Declarations of a street-car conductor, made immediately after the accident, that it was his fault, are inadmissible in an action for damages. Williamson v. Cambridge R. Co. 636.

Secondary evidence may be given of the contents of a written application for insurance, made and signed by the party, where the original cannot be obtained. Williamson v. Cambridge R. Co. 636.

Evidence for plaintiff as to condition of track some distance from the place of accident is inadmissible, but cured by an instruction limiting the jury to defects specifically charged. Sidekum *et al.* v. Wabash, etc., R. Co. 640.

An instruction that the jury must consider, in giving damages, plaintiff's condition before and since the injuries, and present and future mental and bodily pain, with all the circumstances, was, under those circumstances, proper. Sidekum *et al.* v. Wabash, etc., R. Co. 640.

EXAMINATION OF PERSON.

See PASSENGERS.

The court has discretion to deny defendant's motion for physical examination of female plaintiff by physicians in an action for damages against a railroad. Sidekum *et al.* v. Wabash, etc., R. Co. 640.

EXCEPTION.

See ERROR; PRACTICE.

EXECUTION.

See DISSOLUTION; FORECLOSURE; FRANCHISES.

EXEMPLARY DAMAGES.

See DAMAGES.

EXPERT EVIDENCE.

See DAMAGES.

EXPLOSION.

[See NEGLIGENCE.

EXPRESS COMPANY.

See CARRIER.

In Pennsylvania a common carrier may by a special contract limit his liability for loss or injury to goods carried by him as to every cause of injury except that arising from negligence. *Grogan v. Adams Express Co.* 9.

When goods are lost or injured while in the custody of an express company, in the absence of explanation rebutting it, a presumption of negligence arises, and the carrier is liable for the actual value of the goods. *Adams Express Co. v. Holmes.* 14.

In such action, where failure to deliver goods is not explained by carrier it may be inferred that they are in carrier's hands and withheld. *Adams Exp. Co. v. Holmes.* 14.

Where an express agent, as such, accepts consignment of intoxicating liquors, knowing or suspecting contents, and delivers the same, he is liable to conviction under an indictment charging him with the illegal sale of such liquors; but in order to such conviction it is essential that knowledge or at least a reasonable suspicion of the contents should exist. *State v. Goss.* 118.

Where the agent delivers the consignment at its terminus to a stage driver, who pays for it with money furnished by the consignee, delivery to him was delivery to the consignee, and the same rule applies. *State v. Goss.* 118.

An express company is not bound to transport and deliver intoxicating liquors if it would thereby incur a penalty; nor is such company or its agents presumed to know the contents of packages. *State v. Goss.* 118.

FALLING PARCEL.

See PASSENGERS.

FEE.

See CONVEYANCE; EMINENT DOMAIN.

FENCES.

SEE DAMAGES.

Under the Illinois statute the fencing of a railroad should embrace entire right of way. *Ohio, etc., R. Co. v. People.* 427.

Mandamus is the proper proceeding to compel railroad to construct fences under the statute. *Ohio, etc., R. Co. v. People.* 427.

FLOODS.

See WATERS AND WATERCOURSES.

FORECLOSURE.

See MORTGAGE.

Franchises such as to run cars, take tolls, appropriate earth, etc., are rights or franchises essential to the operation of the railroad corporation, and such franchises include the right of appropriating lands for the construction of necessary appurtenances. Such franchises are transferred at a marshal's sale of the railroad, and all its franchises to the purchaser even if he is a natural person. *Lawrence v. Morgan's Louisiana, etc., R. Co.* 309.

A decree of a U. S. circuit court that a sale of a railroad in satisfaction of two mortgages practically consolidated, leaving the objections of persons holding a minority of one of the issues of bonds as collateral, and contesting the priority of lien as to some of the property and legality of some of the issues of bonds, to be settled by a subsequent decree, is within the power of the court, and is a final decree from which an appeal may be taken and is right. *First National Bank v. Shedd.* 439.

Under Wisconsin statute consent of bond-holders necessary to foreclosure of mortgage of railroad was duly given, and bonds not surrendered and exchanged for stock were held by persons whose silence gave consent, of which fact the present holders had notice. *Barnes v. Chicago, etc., R. Co.* 453.

That title is insufficient to maintain a bill in equity to take advantage of alleged frauds in foreclosure of prior liens. *Barnes v. Chicago, etc., R. Co.* 453.

A railroad company hypothecated certain county bonds, part of the subscription to its construction by the county, for which the company executed a trust deed securing its bond for the amount of the subscription, on condition that it should pay the interest on the bonds till the construction of the road into the county, and indemnify the county against the principal of the bonds unless the road should be constructed by a time agreed. Other incumbrances were afterwards placed on the road by the company and its successors. A sale subjecting the road to the claims of its creditors was subsequently had, subject to the lien of the county, and part of the proceeds applied to the redemption of the hypothecated bonds. *Held*, that the bonds having been redeemed by the money held in trust for the benefit of creditors of the first corporation, a new corporation could only receive them by paying back into the trust fund the amount by which it had been depleted for their benefit. *Washington, etc., R. Co. v. Lewis.* 468.

FOREIGN CORPORATION.

A foreign corporation purchased the capital stock of a Pennsylvania mining company, reorganized the same, and under its name purchased coal lands. *Held*, that if the purchaser's purpose was a mere device to evade a Pennsylvania statute providing against foreign corporations holding real estate unless authorized by Pennsylvania law, and if the foreign corporation was the real owner, and the name of the other company had been merely used to cover the scheme, the land purchased was subject to escheat. *Commonwealth v. New York, etc., R. Co. et al.* 136.

The testimony before the jury in the above case would have warranted a finding of the issue of facts in favor of the commonwealth, and hence the trial court erred in directing a verdict for the defendant. *Commonwealth v. New York, etc., R. Co. et al.* 136.

FRANCHISES.

See CROSSINGS; EMINENT DOMAIN.

The original grantee from a city of the franchise of a right of way over certain streets or railroads for a fixed term of years cannot, after expiration of that term, enjoin the city from selling the franchise, claiming that the city has not complied with an alleged contract obligation to take and pay for its "railroads, rolling stock, equipments, and fixtures." *Canal, etc., St. R. Co. v. City of New Orleans.* 146.

In such case such failure, even if the obligation existed, could not operate to prolong the franchise, or to restrain the city in the exercise of its sovereign authority over its streets for the benefit of the people to whom they belong in common. *Canal, etc., St. R. Co. v. City of New Orleans.* 146.

In above case the proposed sale covered only the franchise of the right of way. No property of plaintiff's was to be sold, all of his legal rights being expressly reserved under a clause requiring the purchaser to respect and equitably settle for them; and, under the same clause, plaintiff may compete at the sale without waiving any rights. *Canal, etc., St. R. Co. v. City of New Orleans.* 146.

Under the Minnesota statute the purchase by one railroad of the property and franchises of another carries with it the liabilities of the latter, including above claim. *Town of Plainview v. Winona, etc., R. Co.* 259.

Franchises such as to run cars, take tolls, appropriate earth, etc., are rights or franchises essential to the operation of the railroad corporation, and such franchises include the right of appropriating lands for the construction of necessary appurtenances. *Lawrence v. Morgan's Louisiana, etc., R. Co.* 309.

Such franchise is transferred at a marshal's sale of the railroad and all its franchises to the purchaser, even if he is a natural person. *Lawrence v. Morgan's Louisiana, etc., R. Co.* 310.

A deed under a judicial sale of the property and franchises of a railroad that has commenced construction is within recording acts. *Davis v. Titusville, etc., R. Co.* 341.

FRAUD.

See EMINENT DOMAIN; FORECLOSURE.

FREEHOLD.

See EMINENT DOMAIN.

FREIGHT.

See CARRIER; INTERSTATE COMMERCE.

Contract for reduced rates will not be assumed to be illegal as contrary to public policy because lower than ordinary rates; and even though not capable of enforcement against carrier, it is no defence for him where he has deviated from the agreed route. *Langdon v. Robertson.* 23.

Provisions of Georgia Code as to failure of carrier to deliver goods to a connecting carrier and penalty therefor, and as to discrimination in rates of freight by one carrier against another, construed. An order of a railroad relating to certain kinds of merchandise shipped in com-

FREIGHT—Continued.

petition to a certain point on its road, and discriminating as to rates, construed. *Held*, that a shipper compelled to sell merchandise at a loss because of such order could be permitted to testify to that effect, and that under the provisions of the code above mentioned all the elements of actual damage which are admissible in other actions may be shown. *Central Railroad, etc., Co. v. Logan.* 63.

Where evidence showed that large shippers of cattle made an arrangement at point of destination with three trunk lines to even up the live-stock tonnage between these lines, the eveners being required to make special purchases and shipments when necessary to agreed division of business, whether the market justified it or not, shippers to receive commissions on stock shipped by them or other persons, which contract was in operation when plaintiff shipped his stock,—in action by plaintiff to recover excess of freight to that charged other shippers, *held*, that in the absence of evidence that defendant was party to an arrangement with the eveners, plaintiff could not recover. *Rothschild v. Wabash, etc., R. Co.* 76.

Where two rival lines of steamboats bore the same relation to a railroad, each seeking its service to carry freight to same points, and the railroad charged higher rate to one than to the other, *held*, that the damages might be recovered for the discrimination, and that the fact that the rate charged plaintiff was not unreasonable does not affect the question. *Samuels v. Louisville, etc., R. Co.* 79.

Section 90 of the Railways Clauses Consolidation Act, 1845, providing that railway companies' rates shall be equal to all persons as to goods of the same description on the same portion of road under same circumstances, and that no reductions or advances shall be made in favor of or against particular persons, does not prevent the company from making a special charge for goods carried over their railway in pursuance of a traffic agreement with another company under section 87 of the act. *Hull, etc., Dock Co. v. Yorkshire, etc., Iron Co.* 84.

FREIGHT TRAINS.

See PASSENGERS.

GARNISHMENT.

On what state of facts a fund is to be applied by virtue of garnishee proceedings to the payment of a judgment debt. *Milwaukee, etc., R. Co. v. Brooks Locomotive Works.* 499.

GRASS.

See EMINENT DOMAIN.

GUARANTY.

The guaranty of an 8% dividend on the stock of an elevator company by a railroad as an inducement to a subscription to its stock by said elevator corporation is *ultra vires* and void. *Memphis Grain, etc., Co. v. Memphis, etc., R. Co.* 522.

HAY.

See EMINENT DOMAIN.

HEARSAY EVIDENCE.

See EVIDENCE.

HIGHWAY.

See EASEMENT.

HUSBAND AND WIFE.

Right of wife signing deed with her husband conveying her property, but whose name does not appear in the body of it, to maintain ejectment against grantee. *Bradley v. Mo., etc., R. Co.* 379.

HYPOTHECATED BONDS.

See BONDS.

INDICTMENT.

See EXPRESS COMPANY.

INJUNCTION.

A receiver of one railroad also operating another railroad which was not in the hands of the court was sued without leave for an act of negligence on the road not in the court's hands. Defence was the receivership, and that court had not authorized suit. *Held*, a court of chancery can only interfere by injunction against the party suing, restraining further progress of the action, and not against the law court or any of its officers; hence it was no jurisdictional bar to the suit that leave to prosecute had not first been obtained. *Lyman v. Central Vermont R. Co.* 210.

In such case a receiver stands, as to the business of the road not under the court's control, not as a receiver and an officer of the court, but as a party *sui juris*, acting as his own principal and upon his own responsibility. *Lyman v. Central Vermont R. Co.* 210.

An assignee of a lease of land through which a railroad seeks to condemn a right of way will not be granted an injunction to prevent it from so doing, but will be left to his remedy at law; the assignee being president of a rival road, and denying the power of the other company to condemn the land. *Piedmont, etc., R. Co. v. Speelman.* 316.

Where a railroad company supposed it had no power to condemn the interest of the assignee of a lease of land through which it desired to run, said assignee refusing to sell, and where proceedings in which the original lessee had been made a party had failed, the remedy of the railroad company is to amend its charter and not by bill of injunction. *Piedmont, etc., R. Co. v. Speelman.* 316.

INSOLVENCY.

See DISSOLUTION.

INSURANCE.

See DAMAGES.

INSURANCE APPLICATION.

See EVIDENCE.

INTEREST.

See DAMAGES; FORECLOSURE.

In action against carrier for damages to live stock interest may be allowed from date of contract (if the suit is considered as *ex contractu*), or from the date of the injury (if the action be viewed as one in tort). *Illinois Central R. Co. v. Haynes*. 38.

The town may recover from said company the interest of such bonds for which judgment has been entered against it in the United States courts; the company having transferred such bonds to the citizens of another State who obtained such judgment against the town. *Town of Plainview v. Winona, etc., R. Co.* 259.

Where master's finding as to when interest begins to run on award of land damages under a contract to convey land is equivocal, no more can be allowed than is asked for by the bill, nor can it be amended. *Robinson v. Missisquoi, etc., R. Co.* 299.

INTERSTATE COMMERCE.

See FREIGHT.

Arkansas statute provided that railroad company should not charge greater sum for freight than that specified in bill of lading, and that railroad should be liable in damages for refusal to deliver goods upon payment of such charges. *Held*, that the act, being general and uniform in its operation upon all persons coming within the class to which it applied, was not unconstitutional as special legislation. *Held, further*, that such act was a police regulation for preventing delay in the delivery of freight, and did not affect interstate commerce. *Little Rock, etc., R. Co. v. Hanniford*. 67.

Transportation of property from one State to another is interstate commerce, whether the carriers engaged in moving it, or the vehicle on which it is borne, cross the line of the State or not. *Ex parte Koehler, Receiver, etc.* 71.

The Interstate Commerce Act applies only to carriers using a railway, or a railway and water craft, "under common control, management, or arrangement for a continuous carriage or shipment" of property from one State to another; it does not apply to the carrying of property by rail wholly within the State, although shipped from or destined to a place without the State, so that such place is not a foreign country. *Ex parte Koehler, Receiver, etc.* 71.

The Oregon Railway and Navigation Co. carries by steamer at reduced rates. The Oregon & California Railway, under management of a receiver, carries same goods at reduced rates. The Oregon Pacific R. Co. carries same goods between certain points on the line of the Oregon & California road by railway and steamer at reduced rates, and thereby competes with above-named carriers in transportation to San Francisco. The Oregon Railway and Navigation Co. and the receiver of the Oregon & California Railway act independently, though concurrently, in making these reduced rates, but through bills of lading are not given, nor is either interested in or liable for the carriage of the goods beyond its own line. *Held*, that the Oregon & California road and steamers of the Oregon Railway and Navigation Co. are not used under common control and do not otherwise come within provisions of the Interstate Commerce Act. *Ex parte Koehler, Receiver, etc.* 71.

INTOXICATING LIQUORS.

See EXPRESS COMPANY.

JOLTS.

See PASSENGERS.

JUDGMENT.

On what state of facts a fund is to be applied by virtue of garnishee proceedings to the payment of a judgment debt. *Milwaukee, etc., R. Co. v. Brooks Locomotive Works.* 499.

JUDICIAL SALE.

See FORECLOSURE; FRANCHISES.

JURISDICTION.

See PRACTICE; REMOVAL OF CAUSES.

JURY.

See PRACTICE.

A case in which it is left by statute to the discretion of the court to make an order to allow the jury to view the premises. *Coughlin v. Chicago, etc., R. Co.* 330.

The fact that a juror is in the employment of the defendant disqualifies him, and that part of the Mississippi Code providing that the serving of the tales jury in three cases in a present or preceding term is a cause of challenge does not apply to a member of the regular panel for the week. *Louisville, etc., R. Co. v. Mask.* 564.

LABORERS.

See CONTRACTORS.

LAND.

See ESCHEAT.

LANDLORD AND TENANT.

See DAMAGES; LESSOR AND LESSEE.

LEASE.

See EMINENT DOMAIN; INJUNCTION.

LEAVE TO SUE.

See RECEIVERS.

LESSOR AND LESSEE.

A railroad leased ground near a station for a hotel and restaurant. Plaintiff received injuries on defective doorstep near its entrance. *Held*, that, in the absence of evidence that the hotel was managed or controlled by the railroad, the fact that it owned the ground, and that its interests were thereby subserved, imposed no duty on the railroad to repair, and it was not liable for the injury. *Texas, etc., R. Co. v. Mangum.* 131.

A canal once the property of the State of Indiana, but sold under foreclosure proceedings, became the property of a railroad, which thereby assumed a lease originally made by the State to plaintiff's grantors of the right to use water for running mills. The canal had been abandoned for purposes of navigation before the railroad acquired title. Construction of the road on the line of the canal practically deprived the mill-owners of water. In an action by them for damages, *held*, the effect of a covenant for quiet enjoyment, annexed by law to the lease, was that so long as the canal was used for purposes of navigation, and while there was, during such period, a surplus of water above that required for navigation, lessors were bound to do nothing which should interrupt or deprive the lessees of its enjoyment; the State's grantees were not bound to keep the canal in such a condition as to afford water for the mill. Lessees were bound with notice of prior rights. *Hoagland v. New York, etc., R. Co.* 186.

A railroad company constructed a reservoir for the use of its locomotives by building a dam across its stream. A riparian mill-owner sued for damages for the obstruction and use of the water; the defence of the railroad was that it had leased its road, including the dam. *Held*, no defence; *held, further*, that the use of the water by the railroad was not a use for natural or domestic purposes, and if by such use the flow of water to a mill was diminished, and the capacity of the water-power was lessened, it must answer in damages to those injured, but not so in any other case. *Anderson v. Cincinnati Southern R. Co.* 193.

LICENSE.

See ESTOPPEL.

LIGHTS.

See PASSENGERS.

LIEN.

See CONTRACTORS; CONSTRUCTION; DAMAGES; MORTGAGES.

A party whose materials sold to another are used in the construction of a work has no privilege on such work, the materials not being sold to the owner, his agent, or his sub-contractor. *Woodward v. American, etc., R. Co.* 256.

LIMITATIONS.

See AMENDMENT.

Where a contract under which a company took land showed the owners' purpose to be to hold the title until the damages were paid, the owner's right in equity to recover damages or possession is not barred by the Statute of Limitation for fifteen years; and where the finding of the master as to the time when the sum found due commenced to draw interest is equivocal, no more can be allowed than is asked for by the bill, nor can it be amended. *Robinson v. Missisquoi, etc., R. Co.* 299.

LOCATION.

See EMINENT DOMAIN.

Company first making a survey and setting out the centre line of road is entitled to priority on a question of location. *Davis v. Titusville, etc., R. Co.* 341.

Where a railroad company entered on land, the owner not objecting, and commenced construction which ceased after some time for want of funds, but subsequently was recommenced, there being no agreement as to damages nor any legal proceeding to adjust them, afterwards a bond having been filed, it was *held*, the title to the right of way vested by the original occupation, and tenants after such occupation, operating thereon for oil, were not entitled to damages. *Davis v. Titusville, etc., R. Co.* 341.

MALICE.

See DAMAGES.

MALICIOUS PROSECUTION.

Where a *nolle prosequi* is entered by procurement of the party prosecuted, or by his consent, or by way of compromise, such party cannot maintain an action for malicious prosecution. *Langford v. Boston & Albany R. Co.* 653.

MANDAMUS.

See FENCES; RAILROADS.

MARKET VALUE.

See DAMAGES.

MASTER AND SERVANT.

A driver, just relieved, who in stepping from the car negligently collides with a passenger on the steps, so that the latter falls off and is killed, is still a servant and acting within the scope of his employment, and the company is liable. *Commonwealth v. Brockton St. R. Co.* 632.

MATERIAL-MEN.

See CONSTRUCTION; CONTRACTORS; LIEN.

MEASURE OF DAMAGES.

See DAMAGES.

MISNOMER.

See NAME.

MORTGAGE.

Sec EMINENT DOMAIN.

- A railroad company under agreement to take land at a price fixed by condemnation proceedings refused to pay the consideration without a release of the mortgage incumbrances. *Held*, that so much of the award as was for the benefit of the owners should be applied to their incumbrances upon proof made of its investment in a sinking fund as required by one of the mortgages, and that so much as was for the lessee's interest was applicable to the remaining mortgages in the order of priority. *Long Dock Co. v. Morris, etc., R. Co.* 431.
- A provision in a railroad mortgage for expenditure of money received from sale of property clear of mortgage is not complied with by expenditure before receipt of the purchase-money unless the antecedent expenditure is shown to have been made in reliance on the receipt of the purchase-money. *Long Dock Co. v. Morris, etc., R. Co.* 431.
- A decree of a United States circuit court that a sale of a railroad in satisfaction of two mortgages practically consolidated, leaving the objections of persons holding a minority of one of the issues of bonds as collateral, and contesting the priority of lien as to some of the property and legality of some of the issues of bonds, to be settled by a subsequent decree, is within the power of the court, and is a final decree from which an appeal may be taken and is right. *First National Bank v. Shedd.* 439.
- The court of the State in which an original bill foreclosing a railway mortgage was filed, and upon whose orders the receiver paid all funds in his hands, was the proper tribunal to which a judgment creditor having a judgment for personal injuries against the railroad before it was placed in the hands of a receiver should have applied, and on such creditor's petitioning in an ancillary court in another State that the receiver pay his claim from earnings on hand at his appointment, it was *held*, that he was a general creditor and not entitled to priority of satisfaction out of earnings of receivership nor out of the corpus of the estate. *Central Trust Co. v. East Tenn., etc., R. Co.* 450.
- Under Wisconsin statute consent of bond-holders necessary to foreclosure of mortgage of railroad was duly given, and bonds not surrendered and exchanged for stock were held by persons whose silence gave consent, of which fact the present holders had notice. *Barnes v. Chicago, etc., R. Co.* 453.
- What title is insufficient to maintain a bill in equity to take advantage of alleged frauds in foreclosure of prior liens. *Barnes v. Chicago, etc., R. Co.* 453.
- Unsecured floating debts due by a railroad company for construction, in the absence of statutory provision are not a lien on the railroad superior to the lien of a valid mortgage on it duly recorded and of bonds secured thereby, and held by *bona fide* purchasers for value. *Porter v. Pittsburgh, etc., Co.* 472.
- An agreement under an unconstitutional statute for the issuance of bonds of a town between a railway company and the town is invalid, and the enforcement of such bonds may be resisted by the town. *Town of Plainview v. Winona, etc., R. Co.* 259.
- The town may recover from said company the interest of such bonds, for which judgment has been entered against it in the United States court, the company having transferred such bonds to the citizens of another State who obtained said judgment against the town. *Town of Plainview v. Winona, etc., R. Co.* 259.

NAME.

The misnomer in a charge of witness to whose testimony the court refers is not ground for reversal, the jury not having been misled. *Pennsylvania R. Co. v. Peters.* 607.

NEGLIGENCE.

See CARRIERS; PASSENGERS; WATERS AND WATERCOURSES.

In Pennsylvania a common carrier may by a special contract limit his liability for loss or injury to goods carried by him as to every cause of injury except that arising from negligence. *Grogan v. Adams Express Co.* 9.

When goods are lost or injured while in the custody of an express company, in the absence of explanation rebutting it a presumption of negligence arises, and the carrier is liable for the actual value of the goods. *Adams Express Co. v. Holmes.* 14.

Contract for carriage of live stock limited carrier's liability even in case of negligence to a fixed sum, in consideration of reduced freight. The car, bedded with straw, was placed next the engine, and burned by sparks setting it on fire. Evidence tended to show that so placing a car was unusual and negligent. *Held*—1. That a petition alleging consignment to and loss by carrier through negligence authorized the introduction of evidence to sustain the allegations. 2. That provision of contract protecting against negligence was no defence. 3. That parol evidence was admissible between the parties to show that rate of freight was not reduced and shipper was not bound thereby. *McFadden v. Missouri Pacific R. Co.* 17.

The laws of South Carolina do not permit a common carrier to exempt himself from liability for negligence. *Wallingford v. Columbia, etc., R. Co.* 40.

Under a Texas statute providing that carriers shall not limit their liability as it exists at common law by notice, or in any manner whatever, and that no agreement in contradiction of its terms shall be valid, a carrier contracted that he should not be liable for damages to live-stock except such as arose from wilful negligence, and that shipper should give notice of his claim by a certain method, place, and time, and the time named in the contract was less than that prescribed by Statute of Limitations; *Held*, that the contract was in contravention of the statute, except as to the clause limiting the time for bringing suit, which was valid. *Gulf, Colorado, etc., R. Co. v. Frawick.* 49.

A railroad turn-table was located on depot grounds six feet from a street very little used, and had stood there fifteen years. A night-watchman of the railroad, who had known since first built of its danger, fell into it at night and brought action for his injuries. There was no statute requiring the company to fence the depot ground. *Held*, no recovery; negligence will not be presumed from the bare fact of an accident occurring on railroad property; and evidence of other and previous accidents occurring at the same place was inadmissible. *Early v. Lake Shore, etc., R. Co.* 163.

Notices of stock killed in accordance with Arkansas statute were posted at stations; plaintiff, in climbing up to read a notice for an owner unable to read, fell through a defective plank and was injured. *Held*—1. that the railroad was bound to keep platform in good repair for those having a legal right to use it, and was liable to plaintiff. 2. The fact that it was about dark when plaintiff went upon the platform

NEGLIGENCE—Continued.

cannot, as a conclusion of law, be declared *per se* negligent. St. Louis, etc., R. Co. v. Fairbairn. 166.

Plaintiff walking on an elevated plank walk beside a railroad track at a station, hearing a train approaching behind, moved to the middle of the walk, where he would have been safe from passing cars of ordinary width. He was struck on the head by the brake-wheel of a car of extraordinary width and injured. *Held*, that he had a right to use the walk, and to suppose himself in safety in his position when struck, and was guilty of no negligence. *Held, further*, that the railroad's employee seeing him there, and knowing of the extraordinary projection of the brake, was guilty of negligence in not recognizing and guarding against the danger. Sullivan v. Vicksburg, etc., R. Co. 168.

In such case, where the jury awarded \$100 damages, the court, while averse to increasing verdicts, which are rarely too small, awarded \$600 damages. Sullivan v. Vicksburg, etc., R. Co. 168.

A car loaded with giant powder was placed upon a side track to await orders, and took fire and exploded, injuring plaintiff's property. There was no evidence of negligence by the railroad, and the jury had only above facts before them. *Held*, that the burden was on the plaintiff to show that the car was stored in an improper place, and that there was no evidence of this to go to the jury. Walker v. Chicago, etc., R. Co. 173.

A railroad leased ground near a station for a hotel and restaurant. Plaintiff received injuries on defective door-step near its entrance. *Held*, that in the absence of evidence that the hotel was managed or controlled by the railroad, the fact that it owned the ground, and that its interests were thereby subserved, imposed no duty on the railroad to repair, and it was not liable for the injury. Texas, etc., R. Co. v. Mangum. 181.

A receiver of one railroad also operating another railroad which was not in the hands of the court was sued without leave for an act of negligence on the road not in the court's hands. Defence was the receivership, and that the court had not authorized suit. *Held*, a court of chancery can only interfere by injunction against the party suing, restraining further progress of the action, and not against the law court or any of its officers; hence it was no jurisdictional bar to the suit that leave to prosecute had not first been obtained. Lyman v. Central Vermont R. Co. 210.

In such case a receiver stands, as to the business of the road not under the court's control, not as a receiver and an officer of the court, but as a party *sui juris* acting as his own principal and upon his own responsibility. Lyman v. Central Vermont R. Co. 210.

NEW TRIAL.

See PRACTICE.

NOISE.

See DAMAGES.

NOLLE PROSEQUI.

Where a *nolle prosequi* is entered by procurement of the party prosecuted, or by his consent, or by way of compromise, such party cannot maintain an action for malicious prosecution. Langford v. Boston & Albany R. Co. 653.

NOMINAL DAMAGES. ;

See DAMAGES.

NONSUIT.

See DAMAGES; ERROR; PRACTICE.

Motion for nonsuit was properly refused where evidence was conflicting. It is not for the court to determine conflicting evidence. *Wallingford v. Columbia, etc., R. Co.* 40.

NOTICE.

See FORECLOSURE.

Under a Texas statute providing that carriers shall not limit their liability as it exists at common law by notice, or in any manner whatever, and that no agreement in contradiction of its terms shall be valid, a carrier contracted that he should not be liable for damages to live stock except such as arose from wilful negligence, and that shipper should give notice of his claim by a certain method, place, and time, and the time named in the contract was less than that prescribed by Statute of Limitations. *Held*, that the contract was in contravention of the statute, except as to the clause limiting the time for bringing suit which was valid. *Gulf, Colorado, etc., R. Co. v. Trawick.* 49.

Occupancy and use of land, and the running of trains, is sufficient notice of license to railroad, to purchaser from licensor. *Campbell v. Indianapolis R. Co.* 305.

OFFICERS.

See DIVIDENDS.

The statement of one of the directors of the railroad company and superintendent of the construction for the railroad company: what is proven by it. *Dudley v. Toledo, Ann Arbor & Michigan R. Co.* 230.

OPINIONS.

See EVIDENCE.

ORAL EVIDENCE.

See EVIDENCE.

ORDINANCES.

See EMINENT DOMAIN.

ORGANIZATION.

See CHARTER.

PARALLEL LINES.

See CROSSINGS.

PAROL EVIDENCE.

See EVIDENCE.

PARTIES TO ACTIONS.

See ACTIONS; CONSOLIDATION; INJUNCTION; RAILROAD COMMISSIONERS.

Purchaser from the consignor by the acceptance of goods acquires a right of property in them, and may maintain an action against the carrier. *Langdon v. Robertson*. 23.

Under the circumstances of this case there was no necessity to make the lessor of the road a party defendant to the action; and there was no error in refusing to dismiss the case because service was not perfected on the lessor company; that there was no error in charging that if the railroad company had not complied with the law in one section of the code it was liable to the penalty imposed by another section, and that the tender of the cars made to the refusing company was sufficient. *Central Railroad, etc., Co. v. Logan*. 63.

In an action against the carrier to recover damages for negligence in the transportation of oil where the consignors were also consignees, but there was evidence that seamen also had an interest, *held*, that the consignors must be assumed to have right of action, there being no evidence that the seamen were either partners or joint owners, and they were not necessarily parties. *Swift v. Pacific Mail, etc., Co.* 105.

Texas statute construed to mean that if one who was a proper or necessary party defendant resides in the county in which suit is brought, then other defendants who reside in other counties may be joined with him. Under this provision, a defendant residing in another county is entitled, under plea in abatement, to an instruction presenting the question of the liability of the defendant residing in the county where action is brought. *Texas, etc., R. Co. v. Mangum*. 131.

Under the Mississippi Code the right of an administratrix to sue for damages for injuries received from a railroad is indisputable, and the same code permits an action commenced by a deceased person to be revived by his representatives which is distinct from that brought by a widow, husband, or child of a person wrongfully killed for the damage caused by such death to the person suing. *Vicksburg, etc., R. Co. v. Phillips*. 587.

PARTNERSHIP.

See CONNECTING CARRIERS.

PASSENGERS.

See DAMAGES (*Damages by Carriers of Passengers*).

In an action for damages for an injury caused by the falling from a rack of a wringer, having nothing about it to attract particular attention, the denial of a motion for nonsuit was error. *Morris v. New York, etc., R. Co.* 538.

Where it is the usage of a railroad to leave an opening between the cars of a freight train as means of access to a passenger train, it is an invitation for such use, and an injury occasioned by the sudden and unsignalled closing of the train will render the company liable if the passenger acted in a reasonable and prudent manner. *Louisville, etc., R. Co. v. Thompson*. 541.

Where injury was received while alighting from a passenger train, although a stop was sufficient under ordinary circumstances, and the passenger was young, active, and unincumbered, and though the company's failure to adequately light platform was not shown to have

PASSENGERS—Continued.

- contributed directly to the injury, yet, the jury having found the railroad's negligence to have been the cause of the injury, the verdict will not be disturbed. *St. Louis, etc., R. Co. v. White.* 545.
- An amendment, one year after, alleging unsafe construction of the platform as new matter in an action for damages caused by failure to provide a light at the station whereby plaintiff could have avoided his fall, does not introduce a new cause of action, and is not barred by the Alabama Statute of Limitations of one year. *Ala., etc., R. Co. v. Arnold.* 546.
- It cannot be affirmed in the evidence as matter of law that the absence of light was not the proximate cause of an injury shown to have occurred immediately upon the passenger leaving the ticket-office to take the train. *Ala., etc., R. Co. v. Arnold.* 546.
- A passenger who has done what all other persons have done for years is not guilty of want of ordinary care in failing to call for a light or assistance to a train, though familiar with the situation. *Ala., etc., R. Co. v. Arnold.* 546.
- Plaintiff's testimony as to statement of attending surgeon that the operation was a dangerous one is hearsay evidence and inadmissible. *Ala., etc., R. Co. v. Arnold.* 546.
- Leaving of cars outside the station grounds at which trains stop to take on or put off passengers, thus obstructing the city lights, violates the rule that railroad companies must provide for platforms, approaches, means of ingress and egress to and from the train, and servants to give necessary information, and a company is liable for an injury to the passenger seeking such car or cars standing outside and to which a sidewalk erected by the company leads directly, and from which the passenger falls by reason of the insufficient light; nor is it negligence on his part to go outside the yard to reach such car. *Moses v. Louisville, etc., R. Co.* 556.
- Instructions to a jury that a passenger with a ticket bought at a regular station having entered a train, and the conductor having failed to stop a reasonable time, and the passenger having been injured without negligence on his part, the railroad is liable, and that if the train after stopping started before the passenger could alight, and he obeying the conductor's orders, the danger not being apparent, the train moving slowly, attempted to get off, provided he took no more risk than a prudent man would have taken, he was not guilty of contributory negligence,—is a correct statement of the law. *St. Louis, etc., R. Co. v. Person.* 567.
- A refusal to instruct to find for defendant if the jury believed the train stopped a reasonable length of time, and the passenger, failing to get off, leaped from it while in motion, and in so doing was injured, is not error, because negligence is for the jury. *St. Louis, etc., R. Co. v. Person.* 567.
- In an action for injuries received while alighting from a train, a charge that it is the duty of the conductor to assist passengers from the train is erroneous, and the standard of due care and caution on the part of one charged with contributory negligence is that ordinarily exercised by a prudent and reasonable man in possession of ordinary sense and capacity, and one physically deficient must be proportionally cautious. *Simms v. South Carolina R. Co.* 571.
- Passenger who was thrown from the train by a sudden jerk while in the act of alighting, being on the platform in response to the railroad's invitation to alight, the station having been announced, is guilty of no

PASSENGERS—Continued.

- negligence and the railroad may be sued. *Norfolk & W. R. Co. v. Prinnell.* 574.
- The jury must determine whether due diligence requires a train to leave on schedule time, whether persons not passengers should alight before such time, or whether persons passing in front of a train starting or about to start should see to it. *Harris v. Central R. Co.* 581.
- Statute regulating the speed of trains at public crossings does not apply to cases in which the train is started at or upon the crossing. *Harris v. Central R. Co.* 581.
- Hearsay evidence of the fact of the killing of some one upon a certain day, and showing the date at which something else occurred about which witnesses testify, is not evidence of the date of the killing or of the fact itself. *Harris v. Central. etc., R. Co.* 581.
- Evidence that at a former trial the defendant relied upon a different defence to the charge of negligent killing than that relied upon in the present trial is inadmissible. *Harris v. Central R. Co.* 581.
- Under the Mississippi Code the right of an administratrix to sue for damages for injuries received from a railroad is indisputable, and the same code permits an action commenced by a deceased person to be revived by his representatives which is distinct from that brought by a widow, husband, or child of a person wrongfully killed for the damage caused by such death to the person suing. *Vicksburg, etc., R. Co. v. Phillips.* 587.
- The jury must decide whether the railroad is liable for using improper means to clear a train of boys improperly on it whereby the boy ejected received injuries from which he died. *Vicksburg, etc., R. Co. v. Phillips.* 587.
- Under the Mississippi Code prescribing that proof of injury inflicted by trains in motion shall be *prima facie* evidence of want of reasonable skill and care on the part of the railroad's servants, an instruction that the question of care or skill is for the jury is correct, and such part of the code is applicable even where the injury sued for resulted from a precedent wrong of the person injured, and equally where there are a number of witnesses as when seen only by the railroad's servants, though enacted to meet the latter exigency. *Vicksburg, etc., R. Co. v. Phillips.* 587.
- There is no harm in the denial of a motion in an action for personal injuries that plaintiff submit to an examination of two physicians when such examination was made by one physician of defendant previously and another afterwards, and after that one named in the motion also examined plaintiff. *Chicago, etc., R. Co. v. Holland.* 590.
- There is no culpable imprudence or carelessness in the use of a structure, appliance or machine not obviously dangerous that has been in daily use for years, and has uniformly proved adequate, safe and convenient; its use may be continued without the imputation of culpable imprudence or carelessness. *Laffin v. Buffalo, etc., R. Co.* 596.
- ▲ railroad company is not liable for injuries occasioned by the passenger's fault where a platform was some distance from the car-steps, such platform having been in use for several years and no one ever injured or inconvenienced thereby. *Laffin v. Buffalo, etc., R. Co.* 596.
- Where a woman ill and poor was induced by a relative to accept a settlement and compensation for injuries occasioned on a railroad, and in a short time repudiated the settlement, an instruction to the jury that such settlement was no bar to an action for damages was correct. *Stone v. Chicago, etc., R. Co.* 600.

PASSENGERS—Continued.

Opinions of medical experts based upon testimony not believed by the jury, or on a state of facts assumed by the expert, are valueless. *Stone v. Chicago, etc., R. Co.* 600.

When the standard of duty shifts with the circumstances the question of negligence is for the jury; so that where a passenger crowds through incoming passengers getting on the train and, finding on reaching the steps that the train has started, jumps off and is injured and sues the railroad, the jury must say whether the railroad was guilty of negligence in admitting the passengers or starting the train, or whether the plaintiff was guilty of contributory negligence in jumping off. *Pennsylvania R. Co. v. Peters.* 607.

The falling of porcelain lamp-shade whereby a passenger was injured is sufficient to authorize the jury to find that it was in an unsafe condition by the railroad's negligence. *White v. Boston, etc., R. Co.* 615.

A street-car company is a common carrier, and, though not an insurer, is bound to exercise the highest degree of skill and foresight not only in the safe carriage of passengers, but also in the running of its cars and the construction and repairs of its track, and failure to exercise such skill renders it liable for injuries to passenger not himself guilty of negligence. *Citizens' Str. Co. v. Twiname.* 616.

It is a correct instruction to say that it does not necessarily follow that a passenger is negligent in getting on a car even if he knew the track was unsafe, as if the car on which he was riding is standing on the track there is no negligence in responding to an invitation of the company, of which the permission to get on and deposit fares might be sufficient evidence, even with a knowledge of the unsafe condition of the track; having a right to presume that the company would use such care as a person of the highest degree of skill and foresight would have used, but that if the passenger was warned but persisted in getting on he was guilty of contributory negligence. *Citizens' Str. R. Co. v. Twiname.* 617.

In an action against a street-railway company for damages for injury to passengers, an agreement by the plaintiff to take the risk must be specially pleaded and relied upon as a defence. *Citizens' Str. R. Co. v. Twiname.* 616.

A railroad company is bound to stop and bring a passenger having bought a return-ticket back, on the usual and recognized signal being given, and it is the duty of the proper employees to see the signal if given and stop, unless liable, on account of a storm, if stopped, to stop for a long time, though failure to see the signal on that account is no excuse. Such instruction was properly modified under admission of counsel to the effect that if the employees could not in the exercise of due diligence and care have seen the signal there could be no recovery. *Freeman v. Detroit, etc., R. Co.* 623.

Under the Michigan statutes a road is liable on failure to stop a passenger holding a ticket, the proper signal having been given, and there being no lawful excuse for the neglect. *Freeman v. Detroit, etc., R. Co.* 623.

An instruction is objectionable which assumes the existence of any disputed fact; and hypotheses, especially those of utterly inexcusable conduct, unsupported by any evidence, are not to be submitted to the jury as grounds in arriving at a verdict. *Harmon v. Washington, etc., R. Co.* 627.

It is error to refuse an instruction, based on evidence, that the defend-

PASSENGERS—Continued.

ant must prevail if it appear that the plaintiff signalled to stop, the conductor rang the bell, the car slowed down, and the plaintiff stepped from the car while in motion; and the question of defendant's negligence must be submitted to the jury before that of plaintiff's contributory negligence, the latter assuming the former. *Harmon v. Washington, etc., R. Co.* 627.

A driver, just relieved, who in stepping from the car negligently collides with a passenger on the steps so that the latter falls off and is killed, is still a servant and acting within the scope of his employment, and company is liable. *Commonwealth v. Brockton St. R. Co.* 632.

Declarations of a street-car conductor, made immediately after the accident, that it was his fault, are inadmissible in an action for damages. *Williamson v. Cambridge R. Co.* 636.

The court has discretion to deny defendant's motion for physical examination of female plaintiff by physicians in an action for damages against a railroad. *Sidekum et al. v. Wabash, etc., R. Co.* 640.

Evidence for plaintiff as to condition of track some distance from the place of accident is inadmissible, but cured by an instruction limiting the jury to defects specifically charged. *Sidekum et al. v. Wabash, etc., R. Co.* 640.

The whipping of horses by the driver of a car about to start, unless unusual, is no evidence of negligence where plaintiff sued for damages for injuries caused by being thrown from the front platform of a car by a sudden jolt on starting; and as the only witness to the whipping, the plaintiff, did not intimate it was severe, and as cars usually start with a jerk, and such jerk, being forward, could not, anyhow, throw the passenger sideways, there could be no recovery. *Rochat v. North Hudson Co. R. Co.* 644.

Prior to the Massachusetts statute of 1886, chapter 140, a street railway company was not liable to an action of tort for negligently causing the death of a person, whether a passenger or not, upon its road. *Holland v. Lynn & Boston R. Co.* 648; *Gunn v. Cambridge R. Co.* 652.

PERMISSIVE ENTRY.

See ESTOPPEL,

PHYSICIAN.

See EVIDENCE.

PLATFORMS.

See NEGLIGENCE; PASSENGERS.

PLEADING.

See AMENDMENT; DAMAGES; PRACTICE; RAILROADS.

In Illinois, under an unverified plea of the general issue in assumpsit against a common carrier for goods lost, the defendant may at his trial deny his liability under a bill of lading; par. 34 of the Practice Act having no application to such a denial. *St. Louis, etc., R. Co. v. Knight.* 88.

Texas statute construed to mean that if one who was a proper or necessary

PLEADING—Continued.

party defendant resides in the county in which suit is brought, then other defendants who reside in other counties may be joined with him. Under this provision, a defendant residing in another county is entitled, under plea in abatement, to an instruction presenting the question of the liability of the defendant residing in the county where action is brought. *Texas, etc., R. Co. v. Mangum.* 131.

In an action for damages for injuries to crops caused by insufficient culverts on a railroad, whereby drainage of surface-water was impeded, the petition alleged that the grade obstructed drainage over land subject to overflow, causing water to stand longer than it otherwise would have done under similar circumstances. *Held*, that petition was sufficient, and need not allege negligence in construction of the road in those very words. *Sabine, etc., R. Co. v. Hadnot.* 197.

Where petition avers in detail value of crops in an action against a railroad for damage by surface-water, it is sufficient in that regard on general demurrer, although some of the allegations of damage should properly have been stricken out. *Sabine, etc., R. Co. v. Hadnot.* 197.

Parties may be compelled to trial in condemnation proceedings before disposal of a plea of *nul tiel* corporation; there being no law in Illinois allowing any kind of answer to a petition for the condemnation of land. *Henry v. Central, etc., R. Co.* 273.

In an action against a street railway company for damages for injuries to passengers, an agreement by the plaintiff to take the risk must be specially pleaded and relied upon as a defence. *Citizens' Str. R. Co. v. Twiname.* 616.

PLEDGE.

See BONDS.

Railroad constructed on soil not belonging to owner of, or to the corporation which built, the road was movable property; and as such, under the law regulating pledges, the pledgee of the road may take legal possession through a third person chosen by him and the pledgor. *Woodward v. American, etc., R. Co.* 256.

POWDER.

See NEGLIGENCE.

PRACTICE.

See AMENDMENT; CHARGE OF THE COURT; CONTRIBUTORY NEGLIGENCE; DECLARATION; ERROR; PARTIES TO ACTIONS; PLEADING; RAILROADS; RECEIVERS.

That section of the Illinois Practice Act forbidding the dismissal of an action except where a plea of set-off has been interposed in an action on a contract does not apply in a proceeding in a condemnation of land for railroad purposes, and such proceeding may be dismissed by a petitioner any time before rights become vested in the land-owner; the company having the right to abandon one route and select another. *Chicago, etc., R. Co. v. Gates.* 268.

Under the Illinois Eminent Domain Act, judges of the county court have power in vacation to hear condemnation cases, set aside the verdict, and order a new trial. *Centralia, etc., R. Co. v. Rixman.* 336.

Declarations of counsel on a former occasion are not admissible to prove

PRACTICE—Continued.

- malice on defendant's part in order to enhance the damages, nor will counsel be permitted to argue to the jury in disregard of instructions of court. *Baltimore, etc., R. Co. v. Boyd.* 372.
- Under the Iowa Code the sheriff's jury can only assess damages taken by a railroad, and not for injury to property abutting on a street in which the road is laid; nor are objections to the jurisdiction of such sheriff's jury waived by an appeal from their award. *Slough v. Chicago, etc., R. Co.* 396.
- Circuit court, having no jurisdiction on such appeal, properly refused to entertain other objections or to determine the rights of parties if properly presented. *Slough v. Chicago, etc., R. Co.* 396.
- It is too late on appeal to raise the question whether the plaintiff owned the fee or an easement in the street, trial below being on the assumption that he did, and the action being to recover from impairment of easement by operation of an elevated railway. *Drucker v. Manhattan, etc., R. Co.* 418.
- What is a final decree from which an appeal can be taken. *Porter v. Pittsburgh, etc., Co.* 472.
- The Alabama Code does not dispense with the reading of the charges to the jury, such reading being a matter of right. *Ala., etc., R. Co. v. Arnold.* 546.
- The fact that a juror is in the employment of the defendant disqualifies him, and that part of the Mississippi Code providing that the serving of the tales jury in three cases in a present or preceding term is a cause of challenge, does not apply to a member of the regular panel for the week. *Louisville, etc., R. Co. v. Mask.* 564.
- Where a desired qualification to a general charge was not brought to the attention of the court at the time, exception based thereon will not be considered. *Simms v. South Carolina, etc., R. Co.* 571.
- The allowance of a question misreciting witness's testimony and calculated to lead him into error is in the discretion of the court. *Harris v. Central, etc., R. Co.* 581.
- Where the record shows that a cross bill of exceptions is signed on the same or nearly the same date as the principal bill, it is in time, though not sued out until more than sixty days after the trial. *Harris v. Central, etc., R. Co.* 581.

PREFERRED STOCK.

See DIVIDENDS.

PRESUMPTION.

See RIGHT OF WAY.

- The falling of porcelain lamp-shade whereby a passenger was injured is sufficient to authorize the jury to find that it was in an unsafe condition by the railroad's negligence. *White v. Boston, etc., R. Co.* 615.

PRINCIPAL AND AGENT.

- In the absence of proof that a committee of citizens were constituted agents of a property-owner, the latter is not estopped from proceeding under the Iowa statute for land damages, though the company constructed its road on representation of the committee of authority of the land-owner. *Chicago, etc., R. Co. v. Estes.* 276.

PROXIMATE AND REMOTE CAUSE.

See DAMAGES.

It cannot be affirmed in evidence as matter of law that the absence of light was not the proximate cause of an injury shown to have occurred immediately upon the passenger leaving the ticket-office to take the train. Ala., etc., R. Co. v. Arnold. 548.

PUBLIC DUTIES.

The appropriate remedy to compel a railroad to put its road in good condition and run a certain number of trains is not *mandamus* but *quo warranto*. Ohio, etc., R. Co. v. People. 509.

An answer to a petition for *mandamus* showing that a railroad has no funds to repair its road, *mandamus* will not be granted, it being clear that it would prove unavailable, and the courts will only interfere with the management of railroads where the act sought to be enforced is specific and the right clear and undoubted. Ohio, etc., R. Co. v. People. 509.

It is as much as the law requires if a railroad company unable to make repairs and pay running expenses runs a daily passenger train each way over its road. Ohio, etc., R. Co. v. People. 509.

QUO WARRANTO.

See RAILROADS.

RAILROAD COMMISSIONERS.

Under South Carolina statutes railroad commission may suggest to railroads improvements in stations, and enforce such suggestions by such legal proceedings as they may deem expedient, but no provision for penalty or mode of redress is made. *Held*, under this section of statute commission cannot bring suit in their own name to compel a railroad to establish and maintain a station; the railroad, if liable at all, is so under a section providing that where no penalty has been provided for a violation of the statute, the penalty shall not be less than \$1000, to be recovered by the State by action in any circuit court, to be brought by the attorney-general upon request of the commissioners. Bonham v. Columbia, etc., R. Co. 177.

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A subscription by a railroad to an institution wholly unconnected with it is not prevented from being *ultra vires* by the fact that the establish-

RAILROADS—Continued.

ment of the institution might benefit the company by causing an increase of passenger traffic over their line. *Tomkinson v. Southeastern R. Co.* 517.

The guaranty of an 8 per cent dividend on the stock of an elevator corporation by a railway company as an inducement to a subscription to its stock by said elevator corporation is *ultra vires* and void. *Memphis Grain, etc., Co. v. Memphis, etc., R. Co.* 522.

RECEIVER.

See CONSOLIDATION; DISSOLUTION.

Entire capital stock and more was expended by a railroad in building and equipping. Bonds were issued, but the indebtedness had not been liquidated nor the interest on the bonds paid; under a New Jersey statute a bill was filed and a receiver appointed; on motion to dissolve and dismiss, *held*, that the facts justified a conclusion of insolvency within the statute, and authorized a receiver's appointment. *Held, further*, the court should get rid of a receiver at the earliest possible moment consistent with the interest of creditors and stockholders, and that when the admitted liabilities and receiver's expenses are paid he will be discharged. *Sewell v. Cape May, etc., R. Co.* 155.

A receiver of one railroad also operating another railroad which was not in the hands of the court was sued without leave for an act of negligence on the road not in the court's hands. Defence was the receivership, and that court had not authorized suit. *Held*, a court of chancery can only interfere by injunction against the party suing, restraining further progress of the action, and not against the law court or any of its officers; hence it was no jurisdictional bar to the suit that leave to prosecute had not first been obtained. *Lyman v. Central Vermont R. Co.* 210.

In such case a receiver stands, as to the business of the road not under the court's control, not as a receiver and an officer of the court, but as a party *sui juris*, acting as his own principal and upon his own responsibility. *Lyman v. Central Vermont R. Co.* 210.

The court of the State in which an original bill foreclosing a railway mortgage was filed, and upon whose orders the receiver paid all funds in his hands, was the proper tribunal to which a judgment creditor having a judgment for personal injuries against the railroad before it was placed in the hands of a receiver should have applied, and on such creditors petitioning in an ancillary court in another State that the receiver pay his claim from earnings on hand at his appointment it was held that he was a general creditor, and not entitled to priority of satisfaction out of earnings of receivership nor out of the corpus of the estate. *Central Trust Company v. East Tennessee, etc., R. Co.* 450.

RECORDING ACTS.

A deed under a judicial sale of the property and franchises of a railroad that has commenced construction is within recording acts. *Davis v. Titusville, etc., R. Co.* 841.

RELIGIOUS CORPORATIONS.

A railroad company taking land for construction is required either to take the whole of the block of land belonging to a religious association for the purpose of building a cathedral, but which had not completed the building for lack of funds, or, having taken part, to withdraw from all, paying damages and costs; the land thus set apart had not lost its distinctive ecclesiastical character though the building was not completed. *Cathedral v. West Ontario, etc., R. Co.* 422.

REMOVAL OF CAUSES.

Under the Illinois statute, one railway has no authority to appropriate a portion of the right of way of another company in order to construct parallel lines, and an allegation by the latter in such proceeding by the former that the whole right of way was necessary for the discharge of certain conditions imposed by the act of Congress granting the right of way does not entitle the removal of the cause to the United States courts. *Illinois, etc., R. Co. v. Chicago, etc., R. Co.* 287.

RENT.

See DAMAGES.

RES GESTÆ.

See EVIDENCE.

RIGHT OF WAY.

See DAMAGES.

Under the Indiana statute giving a railroad power to lay out its road not exceeding six rods wide, it will be presumed as against one claiming under a licensor of a railroad who has entered upon and constructed its road that the right of way extended to the full statutory width. *Campbell v. Indianapolis R. Co.* 305.

The fee in land taken for a railroad remains with the owner of the land, and the railroad has no right as against him to give away grass cut by his servants upon the land. *Bailey v. Sweeney.* 328.

RIVAL RAILROAD.

See INJUNCTION.

SECONDARY EVIDENCE.

• See EVIDENCE.

SETTLEMENT.

See COMPROMISE.

SIGNALS.

See PASSENGERS.

A railroad company is bound to stop and bring a passenger having bought a return-ticket back, on the usual and recognized signal being given, and it is the duty of the proper employees to see the signal if given and

SIGNALS—Continued.

stop, unless liable on account of a storm, if stopped, to stop for a long time, though failure to see the signal on that account is no excuse. Such instruction was properly modified under admission of counsel to the effect that if the employees could not in the exercise of due diligence and care have seen the signal there could be no recovery. *Freeman v. Detroit, etc., R. Co.* 623.

Under the Michigan statutes a road is liable on failure to stop for a passenger holding a ticket, the proper signal having been given, and there being no lawful excuse for the neglect. *Freeman v. Detroit, etc., R. Co.* 623.

SINKING FUND.

See MORTGAGE.

SMOKE.

See DAMAGES.

SPECIAL DAMAGES.

See DAMAGES.

STATIONS.

See NEGLIGENCE.

Under South Carolina statutes railroad commission may suggest to railroads improvements in stations, and enforce such suggestions by such legal proceedings as they may deem expedient, but no provision for penalty or mode of redress is made. *Held*, under this section of statute commission cannot bring suit in their own name to compel a railroad to establish and maintain a station; the railroad, if liable at all, is so under a section providing that where no penalty has been provided for a violation of the statute the penalty shall not be less than \$1000, to be recovered by the State by action in any circuit court, to be brought by the attorney-general upon request of the commissioners. *Bonham v. Columbia, etc., R. Co.* 177.

STATUTE OF LIMITATIONS.

See AMENDMENT; LIMITATIONS.

STEPS.

See PASSENGERS.

STOCK.

See DIVIDENDS; STOCK ASSESSMENT; STOCK SUBSCRIPTION.

STOCK ASSESSMENT.

See STOCK; STOCK SUBSCRIPTION.

Proof of abandonment of construction by railroad will defeat an action to recover unpaid subscriptions to its stock, and such abandonment is for the jury to determine. *Delaware, etc., R. Co. v. Rowland.* 524.

STOCK SUBSCRIPTION.

See **GUARANTY; STOCK; STOCK ASSESSMENT.**

Where a promissory note was given to a railroad company payable for a certain sum on a fixed day, conditioned that cars should be run over the railroad between points named before January 1st, 1882, and that after this should be done the note was to be paid and five shares of the railroad stock issued to the maker, it was *held*, that the contract only required the stock issued after payment; that the limitation of time applied to construction of railroad; that the contract was a subscription, not a purchase of shares; that payment made subscriber a stockholder without a certificate, and no tender of certificate was required to enable recovery on subscription. *Wempell v. St. Louis, etc., R. Co.* 246.

Instruction to the jury that if cars could be and were safely run over the tracks of said railroad between the points named the condition was fulfilled, is proper in a suit to recover subscription. *Wempell v. St. Louis, etc., R. Co.* 246.

The statute prescribing that the charter of railroad companies must set forth the time when and the manner in which the stock shall be paid for is complied with by the requirement in the charter that the stock shall be paid for in cash, and no certificate shall issue until such payment is made. *New Orleans, etc., R. Co. v. Frank.* 275.

STOCKHOLDERS.

See **CONSOLIDATION; STOCK; STOCK ASSESSMENT; STOCK SUBSCRIPTION.**

When holders of preferred stock are entitled to a dividend. *Hazeltine v. Belfast, etc., R. Co.* 528.

Directors of railroad company are not justified in refusing to declare dividend to preferred stockholder from earnings on hand merely because the corporation cannot pay all of its funded mortgage indebtedness at maturity, if dividends be paid, and the court will compel such action when the question becomes one more of right than of discretion. *Hazeltine v. Belfast, etc., R. Co.* 528.

Where corporation's expenses are trifling beyond \$9000 annually, interest on bonded debt, and the road is leased until 1921 at a rent of \$36,000, all running expenses, repairs, and taxes being paid by the lessee, and the bonded indebtedness is only \$150,000, maturing 1890, which may be renewed on advantageous terms, and the preferred shareholders have had no dividends for many years, thereby enabling the company to pay its debts, such shareholders are entitled to a full annual dividend. *Hazeltine v. Belfast, etc., R. Co.* 528.

STOPPAGE IN TRANSITU.

See **CARRIER.**

A carrier on receiving notice from the consignor to stop goods *in transitu* is bound to act in accordance therewith, although the notice contains no statement of the nature or basis of consignor's right. *Allen v. Maine Central R. Co.* 122.

If the consignor unreasonably refuse to subsequently furnish the carrier with evidence of his right, such refusal may be considered a waiver thereof; but in the absence of such unreasonable refusal the carrier who delivers after notice to stop is liable for the value of the goods. *Allen v. Maine Central R. Co.* 122.

STORM.

See SIGNALS.

STREETS.

See DAMAGES.

STREET RAILWAYS.

See PASSENGERS.

The original grantee from a city of the franchise of a right of way over certain streets for railroads for a fixed term of years cannot after expiration of that term enjoin the city from selling the franchise by alleging or claiming that the city has not complied with an alleged contract obligation to take and pay for its "railroads, rolling-stock, equipments, and fixtures." *Canal, etc., St. R. Co. v. City of New Orleans*. 146. .

In such case such failure, even if the obligation existed, could not operate to prolong the franchise, or to restrain the city in the exercise of its sovereign authority over its streets for the benefit of the people to whom they belong in common. *Canal, etc., St. R. Co. v. City of New Orleans*. 146.

In above case the proposed sale covered only the franchise of the right of way. No property of plaintiff's was to be sold, all of his legal rights being expressly reserved under a clause requiring the purchaser to respect and equitably settle for them; and, under the same clause, plaintiff may compete at the sale without waiving any rights. *Canal, etc., St. R. Co. v. City of New Orleans*. 146.

Prior to the Massachusetts statute of 1886, chapter 140, a street railway company was not liable to an action of tort for negligently causing the death of a person, whether a passenger or not, upon its road. *Holland v. Lynn & Boston R. Co.* 648; *Gunn v. Cambridge R. Co.* 652.

One indorser with others of a note secured by pledge is subrogated to all rights of pledgee by payment of the note. *Woodward v. American, etc., R. Co.* 256.

SUBSCRIPTION.

See CONTRACT; RAILROADS; STOCK ASSESSMENT.

SUDDEN JOLT.

See PASSENGERS.

SURFACE-WATERS.

See WATERS AND WATERCOURSES.

SURVEY.

See LOCATION.

TERMINI.

See ORGANIZATION.

TICKETS.See **PASSENGERS.****TITLE.**See **CONVEYANCE.****TORT.**See **ASSAULT; TRESPASS.**

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The mere entry of a complaint before a trial justice, and the issue thereon of a warrant of arrest, will not render the complaining party or his principal liable in trespass for the acts of the officer in serving the warrant, nor does an act done by legal authority constitute an assault. *Langford v. Boston & Albany R. Co.* 653.

TRAINS.See **RAILROADS.****TRESPASS.**See **TORT.**

Authority and assent of a railroad company to a trespass by a sub-contractor in appropriating uncondemned land must be proven to hold it liable. *Wattmeyer v. Wisconsin, etc., R. Co.* 384.

TRESPASSERS.See **PASSENGERS.****TRIAL.**See **EVIDENCE; PLEADING; PRACTICE.**

After a witness has been asked on cross-examination if he had not sued defendant for damages arising out of the same delay, he may be asked, on re-direct examination, whether his suit had not been settled. *Illinois Central R. Co. v. Haynes.* 38.

It is not error to permit plaintiff, in such case, to contradict conductor of cattle train, by proving against his statement previously made, that he would testify as favorably as possible for defendant, which declaration he denied having made. *Illinois Central R. Co. v. Haynes.* 38.

Motion for nonsuit was properly refused where evidence as to carrier's acts was conflicting. It is not for the court to determine conflicting evidence. *Wallingford v. Columbia, etc., R. Co.* 40.

Certain portions of the court's charge urging a jury to an agreement, and not properly excepted to by counsel, will not be considered on appeal. The mere statement by the judge of these facts in the record, although written by him and signed officially, cannot be received as its substitute. *Owens v. Missouri Pacific R. Co.* 205.

ULTRA VIRES.

See **CONNECTING CARRIER.**

A subscription by a railroad to an institution wholly unconnected with it is not prevented from being *ultra vires* by the fact that the establishment of the institution might benefit the company by causing an increase of passenger traffic over their line. *Tomkinson v. Southeastern R. Co.* 517.

The guaranty of an 8% dividend on the stock of an elevator corporation by a railroad company as an inducement to a subscription to its stock by said elevator corporation is *ultra vires* and void. *Memphis Grain, etc., Co. v. Memphis, etc., R. Co.* 522.

Carrier undertook to deliver cotton for shipment by steamer to Shippers' Compress Company by a certain time. Its agent had timely notice of the effect of the delay which subsequently occurred. The Compress Company was obliged to pay demurrage, and in its suit against the carrier to recover it was *held* that subsequent acceptance of the cotton was not a waiver of stipulation as to time, and that the carrier's contract was not *ultra vires*. *Norfolk & Western R. Co. v. Shippers' Compress Co.* 57.

VENDOR AND PURCHASER.

See **STOPPAGE IN TRANSITU.**

UNITED STATES COURTS.

See **REMOVAL OF CAUSES.**

VACATION.

See **PRACTICE.**

VARIANCE.

See **DAMAGES.**

VERDICT.

The verdict of a jury of the vicinage will not be disturbed in an expropriation proceeding for the right of way unless inconsistent with the proof in the record or unsupported by the evidence. *New Orleans, etc., R. Co. v. Frank.* 275.

To set aside a verdict as contrary to the law and the evidence plaintiff in error must show that, having waived all his own evidence merely oral and given full force to his adversary's, the verdict is still erroneous. *Norfolk & W. R. Co. v. Prinnell.* 574.

VIEW.

See **JURY.**

WAIVER.

See **DAMAGES.**

WAREHOUSEMAN.

See CARRIERS.

WATERS AND WATERCOURSES.

A canal once the property of the State of Indiana, but sold under foreclosure proceedings, became the property of a railroad, which thereby assumed a lease originally made by the State to plaintiff's grantors of the right to use water for running mills. The canal had been abandoned for purposes of navigation before the railroad acquired title. Construction of the road on the line of the canal practically deprived the mill-owners of water. In an action by them for damages, *held*, the effect of a covenant for quiet enjoyment, annexed by law to the lease, was that so long as the canal was used for purposes of navigation, and while there was, during such period, a surplus of water above that required for navigation, lessors were bound to do nothing which should interrupt or deprive the lessees of its enjoyment; the State's grantees were not bound to keep the canal in such a condition as to afford water for the mill. Lessees were bound with notice of prior rights. *Hoagland v. New York, etc., R. Co.* 186.

A railroad company constructed a reservoir for the use of its locomotives by building a dam across its stream. A riparian mill-owner sued for damages for the obstruction and use of the water; the defence of the railroad was that it had leased its road, including the dam. *Held*, no defence; *held, further*, that the use of the water by the railroad was not a use for natural or domestic purposes, and if by such use the flow of water to a mill was diminished, and the capacity of the water-power was lessened, it must answer in damages to those injured, but not so in any other case. *Anderson v. Cincinnati Southern R. Co.* 193.

In an action for damages for injuries to crops caused by insufficient culverts on a railroad, whereby drainage of surface-water was impeded, the petition alleged that the grade obstructed drainage over land subject to overflow, causing water to stand longer than it otherwise would have done under similar circumstances. *Held*, that petition was sufficient, and need not allege negligence in construction of the road in those very words. *Sabine, etc., R. Co. v. Hadnot.* 197.

In such case a railroad was not liable if the overflow was so extraordinary that ordinary prudence would not have provided against it in construction of culverts; but if the flood, though extraordinary, might reasonably have been anticipated, the company was liable. *Sabine, etc., R. Co. v. Hadnot.* 197.

Where petition avers in detail value of crops in an action against a railroad for damage by surface-water, it is sufficient in that regard on general demurrer, although some of the allegations of damage should properly have been stricken out. *Sabine, etc., R. Co. v. Hadnot.* 197.

In an action against a railroad for injury by the overflow of a river caused by insufficient culverts, the overflow was an unusual one, but it was shown that, in three previous years, similar floods occurred. *Held*, that if the overflow was so extraordinary as not to have been reasonably anticipated, the railroad was not liable; but if, although the flood was extraordinary, it might reasonably have been anticipated, the railroad was liable; and previous floods warranted jury in finding that it should reasonably have been anticipated. *Gulf, etc., R. Co. v. Pomeroy.* 200.

In an action for damages for overflow of water on some land by faulty construction of railroads the measure of damages is the difference between the value of the plaintiff's land before the construction of said em-

WATERS AND WATERCOURSES—Continued.

bankment, and the value of the same immediately after said damage, if any, was caused by said defendant. *Owens v. Missouri Pacific R. Co.* 205.

In such case an instruction is not erroneous that the railroad was not bound to construct culverts in places where the water did not naturally flow out, an instruction having been previously given that if the work of the railroad caused the overflow, it was not entitled to recover. *Owens v. Missouri Pacific R. Co.* 205.

Where, in such case, certain witnesses declared that the standing water was wholly caused by the railroad embankment and other witnesses declared that the embankment did not affect the flow of water, and a verdict was given for plaintiff, *held*, that the verdict would not be set aside because the evidence would have sustained a verdict for a larger sum, nor could it be said that the jury found against the evidence as to the cause of the standing water. *Owens v. Missouri Pacific R. Co.* 205.

WITNESS.

See EVIDENCE; NAME; TRIAL.

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